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No. _____

SUPREME COURT OF THE UNITED STATES

October Term, 1993

ANDREW LEO LOPEZ,

Petitioner,

vs.

BEHLES, *et al.*,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S PETITION FOR *WRIT OF CERTIORARI*

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65 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether or not Petitioner had standing to appeal orders of the Bankruptcy Court where he became a creditor of the estates pursuant to his professional employment under 11 U.S.C. § 327 and his compensation bears a priority under 11 U.S.C. § 507(a)(1) and shall be allowed under 11 U.S.C. § 503(b)(4) pursuant to 11 U.S.C. §§ 501(a) & 502(a);

2. Whether due process of law and equal protection of the laws is violated by court action where lower courts fail to uphold Petitioner's contractual rights as a professional employee who was employed pursuant to the United States Bankruptcy Code and which terms are contained in the order of employment.

3. Whether due process of law and equal protection of the laws is violated by court action where lower courts impose duties on Petitioner as a Certified Public Accountant, but left Petitioner without standing [means] to discharge his professional duties.

PARTIES TO THE PROCEEDINGS BELOW

Appellees and Respondents in Lopez v. Behles *et al.* are Daniel J. Behles Bankruptcy Trustee for American Ready Mix, Inc., and American Sand and Gravel, Inc. D/B/A Albuquerque Sand and Gravel, Inc. [Jointly Administered], and Western Bank.

American Ready Mix, Inc. and American Sand and Gravel are debtors under the United States Bankruptcy Code which have no parents or subsidiaries and are not parties to this action.

There are no other corporate parents or subsidiaries which are parties to this action.

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OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Tenth Circuit In Re American Ready Mix, Inc., 14 F.3d 1497 (1994) is set forth in Appendix A hereto and the opinion and judgment of the United States Court of Appeals for the Tenth Circuit entered April 28, 1994, is set forth in Appendix B hereto.

JURISDICTION

The Orders and Judgments of the Tenth Circuit of four related bankruptcy appeals were entered February 2, 1994, and April 28, 1994, respectively. The Court granted [April 22, 1994] an extension of time [A885] within which to file a Petition for a *Writ of Certiorari* to the United States Court of Appeals for the Tenth Circuit until June 2, 1994 and this Petition was filed within that date.

Therefore, this court's jurisdiction is invoked pursuant to: 28 U.S.C. §§§ 1293(b), 1651(a), 2101(c).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Article I, § 8, Clause 4.

> "[The Congress shall have Power] to establish a uniform Rule of Naturalization, and uniform laws on the subject of Bankruptcies throughout the United States;"

Constitution of the United States, Article III, § 1:

> "The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish;"

Constitution of the United States, Article III, § 2:

> "The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States...."

Constitution of the United States, Fourteenth Amendment, § 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES INVOLVED

Because of their length, Petitioner presents only citations of statutes involved and verbatim contents appear at Appendix C:

11 U.S.C. § 101(5)

11 U.S.C. § 101(10)(A)

11 U.S.C. § 101(14)(E)

11 U.S.C. § 301

11 U.S.C. § 327(a)

11 U.S.C. § 348(a)

11 U.S.C. § 362

11 U.S.C. § 363(b)(1)

11 U.S.C. § 501(a)

11 U.S.C. § 502(a)

11 U.S.C. § 503(b)(4)

11 U.S.C. § 507(a)(1)

11 U.S.C. § 1109(b)

28 U.S.C. § 455(a)

28 U.S.C. § 455(b)(1)

28 U.S.C. § 1293(b)

28 U.S.C. § 1651(a)

STATEMENT OF THE CASE

Two corporations with shared stockholders [Brother/Sister] filed petitions for reorganization pursuant to 11 U.S.C. § 301. The larger of the two produced and sold ready-mixed concrete for use by the construction industry. The smaller produced sand and gravel, most of which was sold to the larger and the remainder to third parties. The companies did almost $5,000,000 per year of business, employed approximately 70 people, and were one of the

largest privately held companies in New Mexico and were substantially owned and operated by Hispanic minorities.

Upon motion by the Taxation and Revenue Department of New Mexico, joined by the Internal Revenue Service and after notice and hearing, the Court ordered conversion of the petition from reorganization to liquidation under Chapter 7 of the Bankruptcy Code and operation of the business until they could be sold in order to satisfy secured and unsecured claims.

Accordingly, a trustee was employed and he in turn employed lawyers and an accountant. Instead of operating the debtors until they could be sold, he abandoned the key assets [land, offices, production facilities and trucks] of the ready-mix operation in a way that the former debtor-in-possession could obtain them to start a new company free of liens and without any payment to the estate. The trustee also abandoned not only the mining equipment of the sand and gravel operation, but the entire

going concern which also ended up in the hands of the former debtor-in-possession without payment to the estate for the benefit of the creditors.

The trustee abandoned both sets of assets without notice to the creditors, without appraisals, and without any, but the most perfunctory, attempt to sell the assets for fair market value. In the case of the sand and gravel the collusion and fraud among the parties to the transaction were so blatant that the bank which held the assets as collateral provided unadvertised financing during a sham public offering of the assets without public notice at attractive terms to the debtor-in-possession who was the guarantor of the original note.

Moreover, the trustee [See Application for Extension of Time A885 at Exhibit B] who was looting the estate to the detriment of the creditors improperly failed to disclose an impermissible conflict of interest which would have disqualified him pursuant to 11 U.S.C. §

101(13)(E).

The trustee hired his office mate to be the accountant for the estates and he too failed to disclose a disqualifying conflict and he performed an analysis that was used to justify abandonment of the sand and gravel business that was egregiously incompetent and a fraud on the court.

Petitioner who was properly employed [See Appendix A at p. 10] during the voluntary portion of the petition pursuant to 11 U.S.C. § 327(a) became a creditor pursuant to 11 U.S.C.§ 101(10)(A) after the court entered an order to convert the debtors pursuant to 11 U.S.C. § 348(a). Petitioner's claim, 11 U.S.C. § 101(5), bears a priority pursuant to 11 U.S.C. § 507(a)(1) which shall be allowed pursuant to 11 U.S.C. § 503(b)(4) and Petitioner filed his proof of claim pursuant to 11 U.S.C. § 501(a) and there were no objections, 11 U.S.C. § 502(a), from anyone including the trustee who has also confirmed in open court that Petitioner

is a creditor of both estates by his testimony in open court which averment must be taken as true. See In Re *Herrera*, 23 B.R. 796 (Bkrtcy App. 9th Cir. 1982). The Opinion [Appendix A at p. 8] suggests that the trustee disputes Petitioner's status as a creditor. The sixth lawyer for the trustee for the first time and in an appellate pleading claimed that Petitioner was not a creditor solely because he had not filed his claim. The misstatement of fact was manifestly erroneous and none of Petitioner's allegations of fact or averments have ever been denied, disputed or otherwise objected to by any party in interest in any responsive pleading. Undenied averments must be accepted as true. *Citizen's National Bank v. Davisson*, 229 U.S. 212 (1913). The manifest error in the decision [Appendix A at p. 8] at issue incorrectly finds that the Petitioner was not a creditor pursuant to 11 U.S.C. § 101(10); however the Appellate Court did not read through to 11 U.S.C. § 101(10)(A) or consider 11 U.S.C. § 348 and

demonstrated its confusion by Note 3 [Appendix A at p. 8].

In order to protect his interests Petitioner objected to several actions taken by the trustee and moved for recusal of the Bankruptcy Judge pursuant to 28 U.S.C. § 455(a) and § 455(b)(1) on the grounds that the judge had demonstrated manifest bias and had made a wrongful conversion of the estates from reorganization to liquidation and had sought to legitimize and mask the truth of the wrongful conversion with specious findings of fact and conclusions of law. This latter averment has never been denied or rebutted by any of approximately 350 parties in interest including the Bankruptcy Court itself, the District Court, the Appellate Court, the U.S. Trustee, the bankruptcy trustee. ***Citizens National Bank***.

Accordingly, Petitioner appealed four different orders to the District Court and successfully moved to have them all adjudicated in one court in order to consider one appeal in

four parts, effect judicial economies, and present the full factual topography before a single district court. The court assigned the appeals to a magistrate court for administration and ministerial duties but in fact the magistrate ended up ruling against Petitioner on all the appeals and Petitioner appealed to the United States Court of Appeals for the Tenth Circuit.

During proceedings in district and magistrate court only the Chapter 7 trustee and Western Bank filed briefs and notices of appearance. Both argued mootness and lack of stay and moved for dismissal. None argued lack of standing at this level of appeal.

Standing became an issue *sua sponte* when the Tenth Circuit ordered briefs on the matter and the Tenth Circuit evaded ruling on the facts and evidence which remain uncontested and incontrovertible, ***Citizens***, by ruling that Petitioner lacked standing to prosecute his appeals.

For judicial notice Petitioner comes before this Court *Pro Se* because no member of the Bankruptcy Bar in New Mexico would risk the wrath of the Rose Bankruptcy Court by representation of Petitioner in these appeals.

REASONS FOR GRANTING THE *WRIT*

1. THE JURISDICTION OF THIS COURT IS PROPERLY INVOKED.

The appeals arose from two bankruptcy petitions pursuant to 11 U.S.C. § 301 which then went to District Court, Magistrate Court and Appellate Court.

The final judgments below were filed February 3, 1994 [three of four related appeals] and April 28, 1994 [fourth of four related appeals] and the court granted an extension of time [A885] within which to file for a *Writ of Certiorari* pursuant to 28 U.S.C. § 2101(c).

Further, this proceeding is governed by 28 U.S.C. § 1651(a) *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 26 and the cases and controversies presented below arise from 11 U.S.C. § 101 *et*

seq. [The Bankruptcy Code].

Moreover, "Supreme Court will grant certiorari to resolve conflict of decisions [as here] of federal courts in different circuits...." *Baker*, 417 U.S. 467 (1974).

Finally, the issues presented herein affect millions of bankruptcy petitions in process, the published opinion in question promises to wreak havoc in bankruptcy administration, the prospect of untold litigation arises from the ruling in question and debtors, creditors, professional employees, and creditors now face enormous and unnecessary uncertainties regarding professional employment in bankruptcy, fees, and the rights of professional employees under the priorities codified in the Bankruptcy Code.

Therefore, this Court should issue a *Writ*.

2. DECISIONS BELOW CONFLICT WITH DECISIONS OF SIMILAR MATTERS OF OTHER UNITED STATES COURTS OF APPEALS.

Property

The trustee abandoned the assets necessary

and sufficient to reconstitute the debtors without any payment to the estates and without any but the most perfunctory attempt to obtain maximum value to the estates. There was thus no residual value for the creditors to satisfy any portion of their claims. Worse, the abandonments were executed in such a manner that former debtor-in-possession ended up with possession and use of the assets free of liens and without obligation to the estates' creditors including the IRS, the Resolution Trust Corporation and which claims exceeded $4,000,000 of secured and unsecured debt including administrative claims.

"Courts properly entertain [appeals] challenging the equity of a bankruptcy sale transaction, on the assumption that sales tinged by fraud, mistake, or unfairness would generally result in an accepted bid below that which might have been expected in a fair free market situation" In Re *Harwald Company*, 497 F.2d at 444 (7th Cir. 1974). "Thus, when a [creditor]

attacks a bankruptcy sale on equitable grounds related to the intrinsic structure of the sale, he brings himself within the zone of interests which the Bankruptcy Act seeks to protect and to regulate." *Mason v. Ashbeck*, 383 F.2d 779 (10th Cir. 1967); *Webster v. Barnes Banking Co.*, 113 F.2d 1003 (10th Cir. 1940). The decision below does not even apply the Tenth Circuit's own prior rulings on the matter.

The decision below holds that "direct" means only those who are party to a formal document such as a mortgage have standing to appeal. Further, the decision holds that direct pecuniary interest, only indirect, cannot arise from payments into or expenditures from a bankruptcy estate [Appendix A at p. 13]. All creditors pre and post petition, secured, or unsecured and administrative are as straws drawing from the same container and may do so only in accordance with the *schema* codified by Congress in the Bankruptcy Code pursuant to 11 U.S.C. § 507 *et seq*.

The Ninth Circuit held that in a case involving competing claims to a limited fund, a claimant has standing to appeal an order disposing of assets from which the claimant seeks to be paid. In Re *International Environmental Dynamics, Inc.*, 718 F.2d 322, 326 (9th Cir. 1983) quoting with favor *Klein v. Rancho Montana de Oro, Inc.*, 263 F.2d 764 (9th Cir. 1959) and the Bankruptcy Court for the Eastern District of New York, In Re *Sapolin Paints Inc.*, 11 B.R. 930, 936 (1981), ruled that, "a single creditor has sufficient interest to have an order authorizing a sale reviewed, and if appropriate reversed." See also *United States v. Goodstein*, 883 F.2d 1362, 1366 (7th Cir. 1989) cert denied, 494 U.S. 1007; In Re *Gavalier*, 142 B.R. 710, 714 (Bkrtcy. E.S. Pa 1992).

Therefore, the decision below conflicts with decisions in other appellate courts and a *Writ* should issue. ***Baker***.

Trustee

A bankruptcy trustee, even one whose very employment is in dispute, is a fiduciary of the estate's creditors, and his duty to collect and "conserve the assets of the estate and to maximize distribution to creditors" is a fiduciary obligation. In Re *Benny*, 29 B.R. 754, 760 (D.C. N.D. Cal 1983).

Further, the objectives of federal bankruptcy law can be broadly stated to provide for an equitable settling of creditors' accounts by usurping from the debtor his power to control distribution of his assets, *Matter of Quanta Resources Corp.*, 739 F.2d 912, 915 (3rd Cir. 1984) and the trustee must collect the debtor's assets for the estate, reduce the assets to money, and distribute the property of the estate. *Id.*

Therefore, Petitioner's status as a creditor, with a valid claim on the assets of the estates, is a dollars and cents matter sufficient to establish standing to appeal the

trustee's wrongful acts.

Trustee and 11 U.S.C. § 1109(b)

While this section does not explicitly give an individual creditor the right to prosecute claims on behalf of the estate, cases interpreting the section have found such a right is implied. Matter of *Shelby Motel Group, Inc.*, 123 B.R. 98 at 101 (N.D. Ala 1990) "Who could be better to prosecute claims on behalf of a debtor under 1109(b) than a badly harmed creditor?" *Id.* at 103.

When a trustee fails to prosecute an action or an issue [as here where the estates have numerous claims against others] a creditor may prosecute in his stead, Matter of *Anderson* 15 B.R. at 345 (Bkrtcy. N.D. Mo 1981), and an appellant has standing to appeal based upon [as here] his interest that arose from the trustee's settling of suits for less than what would be needed to create a surplus. Matter of *Andrerccetti*, 975 F.2d 413 (7th Cir. 1992).

Further, when a debtor-in-possession [as

here] breaches its [sic] statutory duty a creditor may bring action in the debtor's name or even act to remove the trustee. See Matter of *Monsour Medical Center* 5 B.R. 715, 717-178 (Bkrtcy. W.D. Pa 1980).

Therefore, the decision below conflicts with decisions in other federal courts and other appellate courts and a *Writ* should issue. ***Baker***.

Trustee and Fed. R. Civ. P. 24(a)(2)

In addition to the failings *supra* the trustee failed to give notice of abandonment to any but the collaborators in the proposed transactions pursuant to 11 U.S.C. §363(b) and Bankruptcy Rule § 2002(b). By the express language of F.R.B.P. § 2002(a)(2) the "parties in interest" for purposes of § 363(b) include "all creditors" and notice must be provided In Re *Globe Invest. & Loan Co.*, 867 F.2d 556, 560 (9th Cir. 1989) and a single creditor has sufficient interest ***Sapolin*** to have an order reviewed and if appropriate reversed. ***Goodstein***

at 1366.

Because there were no proceeds or even an attempt to maximize proceeds by a sale at fair market value Petitioner's rights were directly and adversely affected pecuniarily by the order of the Bankruptcy Court which lifted the stay pursuant to 11 U.S.C. § 362 and ordered abandonment. In Re *Goodwin's Discount Furniture, Inc.*, 16 B.R. 885, 888 (Bankr. 1st Cir. 1982).

Moreover, the Due Process clause of the Fourteenth Amendment as interpreted by *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, and *Mennonite Board of Missions v. Adams*, 462 U.S. 791 in general require actual notice to an affected party whose name and address are "reasonably ascertainable." *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478.

Further, if Petitioner prevails all of the creditors will be sufficiently benefitted that the suit ought to be allowed to proceed, *STN*, 779 F.2d at 905 (2nd Cir. 1985), and Petitioner

has minimally shown that representation [trustee and debtor-in-possession] "may" be inadequate (citations omitted).

In addition, 28 U.S.C. § 1293(b) permits appeals by agreement among the parties and the decision below [Appendix A at p. 15] is manifestly incorrect. Petitioner gave notice of appeal, filed his briefs in District Court, served papers, and the parties responded by filing briefs, filing other papers and attending conferences. Therefore, all parties consented to these appeals and the decision below conflicts with constructive application of 28 U.S.C. § 1293(b).

Because Petitioner is a proper intervenor, pursuant to Fed. R. Civ. P. 24(a)(2) and under 28 U.S.C. § 1293(b) the decision below conflicts with those of other circuits which have considered the matter (citations omitted), this Court should issue a *Writ*.

Accountant

The estates under Chapter 7 of the

Bankruptcy Code employed an accountant who failed the disinterested test pursuant to 11 U.S.C. § 101(14)(E). The Appellate Court ignored uncontested averments and evidence and instead ruled that Petitioner had no standing to appeal an order paying fees to the accountant hired by the trustee. A new accountant became necessary in order for Petitioner to comply with ethical canons affecting conflicts after the debtors left Chapter 11 to Chapter 7 of the Bankruptcy Code.

Petitioner is a creditor harmed by any diminution of the assets of the estate who thereby has standing to appeal any ruling affecting the estate's ability to pay administrative claims ***Sapolin***, and Petitioner has a right to appeal and if warranted have the order reversed. ***Goodstein***.

Because the decision below conflicts with those on similar matters of other circuits, this Court should issue a *Writ*.

Magistrate Jurisdiction

A district court may not refer a bankruptcy action to magistrate for decision. In Re *Elcona Homes Corp.*, 810 F.2d 136 (7th Cir. 1987), and Petitioner raised the issue of magistrate misconduct for the first time on appeal because there was no previous opportunity to raise the issue before the appeals decided by the magistrate court instead of the district court. Raising an issue on appeal is proper where there is no opportunity to make a timely objection in the court below. In Re *Novak*, 639 F.2d 1274 (5th Cir. 1981).

The decision below holds that the court would not consider the issue even though there is an exception to the rule that precludes consideration of claims for the first time on appeal, where refusal to consider the issue would result in a miscarriage of justice, *Calmaquip Engineering West Hemisphere Corp. v. West Coast Carriers Ltd.*, 650 F.2d 633 (5th Cir. 1981); In Re *Corrugated Container Antitrust*

Litigation, 647 F.2d 460 (5th Cir. 1981), and "Rules of Practice and Procedure are devised to promote the ends of justice, not defeat them." *Hormel v. Helvering*, 312 U.S. 552 at 557.

Therefore, this Court should issue a *Writ*.

3. **UNITED STATES COURT OF APPEALS DECIDED IMPORTANT FEDERAL QUESTIONS WHICH HAD NOT BUT SHOULD BE SETTLED BY THIS COURT.**

Disqualification of Bankruptcy Judge

Petitioner moved to disqualify the Bankruptcy Judge as a creditor and professional employee of the estates pursuant to 28 U.S.C. § 455(a) which applies to bankruptcy judges. *Pilla v. American Bar Ass'n.*, 542 F.2d 56, 58 (8th Cir. 1976); *13 Wright, Miller & Cooper* § 3542, and 455(b)(1).

The Bankruptcy Court denied the motion and Petitioner appealed first to District Court and then to the Tenth Circuit which could find no published cases in support of Petitioner [Appendix A at p. 11] and ruled that Petitioner did not have standing to appeal his own motion

to recuse even though there were no disputed facts by anyone including the bankruptcy court and the decision below [Appendix A at p. 10] incorrectly states that uncontested factual allegations need not be taken as true at the appellate level. ***Citizen's National Bank***. The Petitioner was a professional employee and creditor by virtue of his employment with a valid claim. See *13 Wright, Miller & Cooper*, Federal Practice and Procedure; Jurisdiction § 3549.

The rights of professional employees under the Bankruptcy Code pursuant to the Due Process Clause of the Fourteenth Amendment with regard to a fair impartial tribunal are so important to millions of bankruptcy petitions in process where almost every estate employs at least one professional employee, that this Court should review the matter and issue a *Writ*.

Finally, the *All Writs Act* grants the federal courts the power to issue "all writs necessary or appropriate in and of their

respective jurisdictions and arguable to the usages and principles of law," *Roche*.

Therefore, this Court should issue a *Writ*.

Accountants and Courts

This case is not about standing or disputes on the facts. It is about a court system that is dominated by lawyers who will not go where the accusing finger points.

Petitioner [MBA Stanford '73 and CPA: Texas, New Mexico, and California] reviewed the trends in recent court decisions that generally impose the duty of social conscience (citations omitted) upon Certified Public Accountants and exact money judgments whenever a CPA is found to have failed his duty to inform the appropriate parties and authorities of wrongdoing that comes before them during the discharge of their professional services.

The decision below exempts the courts from the scrutiny they expect of CPAs for others. The courts, therefore, have made law and exempted themselves.

The matter should be decided by this Court as a Fourteenth Amendment issue.

4. DECISION BELOW CONFLICTS WITH PRIOR DECISIONS OF THIS COURT ON THE SAME ISSUE.

Standing

The need to limit standing to appeal in bankruptcy proceedings springs from the nature of bankruptcy litigation which almost always involves the interests of persons who are not formally parties to the litigation. See Matter of *Fondiller*, 707 F.2d 441, 443 (9th Cir. 1983).

However, Petitioner was a professional employee whose interests were codified by Congress and who was more than just a concerned bystander, *United States v. SCRAP*, 412 U.S. 669, 687 (1973), and who had a legally protected interest, *Flast v. Cohen*, 392 U.S. at 101-106, which is much more than an identifiable trifle, *SCRAP* at 689 N.24 and his actual or threatened injury may exist solely by virtue of statutes creating legal rights, the invasion of which

creates standing...." See *Linda R. S. v. Richard S.*, 410 U.S. 614, 617.

Petitioner, "asserts his own legal interests, rather than those of third parties, *Warth v. Seldin*, 422 U.S. at 499 and his claim for relief clearly falls within that zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Service Orgs. v. Camp*, 397 U.S. 150, 153 (1970). In such instances the Court has found, in effect, that the constitutional or statutory provision in question implies a right of action in the [Petitioner]. See *Pierce v. Society of Sisters v. Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1967).

Therefore, this Court should issue a *Writ*.

CONCLUSION

The United States Court of Appeals for the Tenth Circuit misconstrued facts, misapplied case law, decided contrary to case law from its own court, decided contrary to decisions from

other circuits on the same facts and issues, ***Baker***, and there are important Federal issues which affect millions of bankruptcy cases in process and billions in assets; therefore, "*Certiorari* and not appeal [is] proper method of reviewing decision[s] of court of appeals wherein it exercised its power to superintend and revise in bankruptcy." See *Holden v. Stratton* 191 U.S. 115 (1903).

Wherefore, Petitioner respectfully prays the Court for a *Writ of Certiorari* to the United States Court of Appeals for the Tenth Circuit, stay pending resolution of the *Writ* publication of the opinion under review, reversal of the judgment of United States Court of Appeals for the the Tenth Circuit, and such other and further relief as the Court may find just under these premises.

Respectfully submitted,

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APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

In re: AMERICAN READY MIX, INC., Debtor, and ALBUQUERQUE SAND & GRAVEL, INC., d/b/a AMERICAN SAND & GRAVEL, INC., Debtor.	)	
ANDREW LEO LOPEZ, Appellant, v. DANIEL J. BEHLES, Trustee, Appellee.	)	No. 93-2042
In re: AMERICAN READY MIX, INC., Debtor, and ALBUQUERQUE SAND & GRAVEL, INC., d/b/a AMERICAN SAND & GRAVEL, INC., Debtor.	)	

ANDREW LEO LOPEZ,	)	
	)	
Appellant,	)	
	)	
v.	)	No. 93-2141
	)	
DANIEL J. BEHLES, Trustee,	)	
	)	
Appellee.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
(D.C. Nos. CIV-91-482-JP and CIV-91-110-JB)

Submitted on the briefs:

Andrew Leo Lopez, pro se.

Karen A. Hasselstrom of Behles & Associates, Albuquerque, New Mexico, for Appellee in case No. 93-2042.

George Moore Moore of Behles & Associates, Albuquerque, New Mexico, for Appellee in case No. 93-2141.

Before TACHA and KELLY, Circuit Judges, and BROWN,* District Judge.

*Honorable Wesley E. Brown, Senior District Judge, United States District Court for the District of Kansas, sitting by designation.

TACHA, Circuit Judge.

Appellant Andrew Leo Lopez, representing himself, appeals from three orders of the district court affirming three orders of the bankruptcy court. The parties addressed the two issues in No. 93-2042 in two sets of briefs, one set for each issue. To keep the issues separate, we will refer to them as "No. 93-2042A" and "No. 93-2042B." In No. 93-2042A, Mr. Lopez challenges a bankruptcy court order that denied his motion to recuse or disqualify the bankruptcy judge pursuant to Rule 5004 of the Bankruptcy Code and 28 U.S.C. § 455(a) and (b)(1). R., Doc. 1, attachment A. In No. 93-2042B, Mr. Lopez challenges a bankruptcy court order that lifted the automatic stay as to Val & Sons, Inc. and Valentin and Marjorie Trujillo, so that Val & Sons could foreclose on its mortgage on certain real property belonging to the American Ready Mix estate. Id., attachment B. In No. 93-2141, Mr. Lopez challenges a bankruptcy court order that authorized the payment of fees to the accountant for the

Chapter 7 trustee. Because we conclude that we lack jurisdiction over these appeals, we dismiss. Construing the appeal in No. 93-2042A as a petition for a writ of mandamus, we deny relief.[1]

JURISDICTION

It is well-settled that this court has an independent duty to inquire into its jurisdiction over a dispute, even where neither party contests it and the parties are prepared to concede it. See Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986). As the appellant, it was Mr. Lopez's duty to establish and include in each opening brief a statement of this court's jurisdiction to consider his appeals. Fed. R. App. P. 28(a)(2).

1. Finality--No. 93-2042A

In No. 93-2042A, Mr. Lopez appeals from an

---

[1] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of these appeals. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cases are therefore ordered submitted without oral argument.

order of the bankruptcy court denying his motion to recuse or disqualify the bankruptcy judge. An order denying a motion to recuse or disqualify a judge is interlocutory, not final, and is not immediately appealable. See Alexander v. Primerica Holdings, Inc., No. 93-5433, 1993 WL 486346, at *7 (3d Cir. Nov. 29, 1993)[2] (noting that most circuit courts recognize "necessity and propriety of interlocutory review of disqualification issues"). Mandamus is an appropriate means of reviewing a judge's refusal to disqualify him- or herself, however. Id.; see also Frates v. Weinshienk, 882 F.2d 1502, 1503-04 (10th Cir. 1989), cert. denied, 494 U.S. 1004 (1990). Even if we construe the appeal as a petition for mandamus, Mr. Lopez nevertheless has failed to

---

[2] In bankruptcy proceedings, an order is final and appealable when it disposes of a "'particular adversary proceeding or discrete controversy pursued within the broader framework cast by the petition.'" Cascade Energy & Metals Corp. v. Banks (In re Cascade Energy & Metals Corp.), 956 F.2d 935, 938-39 (10th Cir. 1992) (quoting Adelman v. Fourth Nat'l Bank & Trust Co. (In re Durability, Inc.), 893 F.2d 264, 266 (10th Cir. 1990)).

demonstrate his entitlement to relief. A threshold question is whether Mr. Lopez has standing to challenge the bankruptcy judge's refusal to recuse himself. The question of standing is also common to the orders appealed from in Nos. 93-2042B and 93-2141.

2. Standing

The Bankruptcy Code of 1978, 11 U.S.C. § 101 et seq., does not contain an explicit grant or limitation on appellate standing. Relying on pre-Code law, however, a number of courts, including this one, Holmes v. Silver Wings Aviation, Inc., 881 F.2d 939, 940 (10th Cir. 1989), have adopted a standard that requires an appellant to show that he is a "person aggrieved" by the challenged bankruptcy court order. That is, only a person "whose rights or interests are directly and adversely affected pecuniarily by the decree or order of the bankruptcy court" may appeal. Id. at 940 (citing Fondiller v. Robertson (In re Fondiller), 707 F.2d 441, 442-43 (9th Cir. 1989)

(internal quotations and other citations omitted). "Litigants are 'persons aggrieved' if the order [appealed from] diminishes their property, increases their burdens, or impairs their rights." GMAC v. Dykes (In re Dykes), No. 93-7235, 1993 WL 490865, at *3 (3d Cir. Nov. 30, 1993) (citing Fondiller, 707 F.2d at 442). The "person aggrieved" test is meant to be a limitation on appellate standing in order to avoid "endless appeals brought by a myriad of parties who are indirectly affected by every bankruptcy court order." Holmes, 881 F.2d at 940.

If there is a dispute in the relevant facts, the issue of an appellant's standing should be remanded to the district court. In re Dykes, No. 93-7235, 1993 WL 490865, at *3. If there is no dispute in the relevant facts, the circuit court may go ahead and decide the issue. Id. We conclude, as we explain below, that Mr. Lopez did not allege sufficient facts in No. 93-2042B, or No. 93-2141 either to raise a fact

question for remand or to establish jurisdiction and, therefore, these appeals are dismissed for lack of standing.

Mr. Lopez asserts he has standing to appeal from all three bankruptcy court orders on the basis he is a creditor of the estates. The parties dispute whether Mr. Lopez is a creditor. Mr. Lopez, an accountant with a business degree, became, post-petition, a professional employee of the debtor companies pursuant to 11 U.S.C. § 327 and the approval of the bankruptcy court. Addendum to Appellant's Br. on Standing, Docs. 1 and 2. Because Mr. Lopez's claim against the estates is post-petition,[3] technically, he is not a creditor. See 11 U.S.C.A. § 101(10). However, whether or not Mr. Lopez is a creditor misses the point.

To have standing to appeal, Mr. Lopez must demonstrate he has a direct and adverse pecuniary interest in each order he challenges.

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[3] Mr. Lopez apparently does have an administrative claim against the estates.

See International Trade Admin. v. Rensselaer Polytechnic Inst., 936 F.2d 744, 746-48 (2d Cir. 1991) (holding that bank with secured interest in lease which was subject of bankruptcy court order had standing to challenge that order); Brady v. Andrew (In re Commercial W. Fin. Corp.), 761 F.2d 1329, 1334-35 (9th Cir. 1985) (holding that, where bankruptcy plan eliminated the interests of certain investors, the investors had standing to appeal from order confirming that plan); Salomon v. Logan (In re International Envtl. Dynamics, Inc.), 718 F.2d 322, 326 (9th Cir. 1983) (holding that claimant who sought part of limited funds had standing to appeal from order disposing of those funds); cf. Pignato v. Dein Host, Inc. (In re Dein Host, Inc.), 835 F.2d 402, 404-07 (1st Cir. 1987) (holding that, where direct injury caused by bankruptcy court order was to corporation, corporate officer who was harmed only indirectly as shareholder lacked standing to appeal).

In No. 93-2042A, Mr. Lopez challenges a

bankruptcy court order in which the judge refused to recuse. Mr. Lopez does not cite, nor have we found, any cases that clearly support his assertion of standing to challenge this order. Arguably, though, he can show a direct and adverse pecuniary interest in this order, because one effect of the bankruptcy judge's refusal to recuse was to leave in place an order converting the proceeding from Chapter 11 to Chapter 7, and the conversion effectively terminated Mr. Lopez's employment with the debtors. Assuming Mr. Lopez has standing, he has failed to demonstrate his entitlement to relief.

The denial of a motion to recuse is reviewed for an abuse of discretion. Hinman v. Rogers, 831 F.2d 937, 938 (10th Cir. 1987). Under § 455, a judge should recuse if "a reasonable person, knowing all the relevant facts, would harbor doubts about the judge's impartiality." Id. at 939. However, "factual allegations do not have to be taken as true,"

and "[t]here is as much obligation for a judge not to recuse when there is no occasion ... to do so as there is ... to [recuse] when there is." Id. "A judge should not recuse ... on unsupported, irrational, or highly tenuous speculation." Id.

Mr. Lopez asserts that the bankruptcy judge was biased against him because, at a hearing on the motion for conversion from Chapter 11 to Chapter 7, opposing counsel offered into evidence a letter from Mr. Lopez to the State of New Mexico in which Mr. Lopez accused the State of having caused the death of the debtors' chief accountant by accusing him of failing to file tax returns for the debtors. After reading the letter, Mr. Lopez says, the bankruptcy judge started ruling against him. Mr. Lopez adds that opposing counsel offered the offending letter again at a later hearing. Except that it is clear that the judge's subsequent decisions were adverse to Mr. Lopez, however, Mr. Lopez's argument that the judge was biased is

unsupported in fact. In addition, and as the district judge correctly pointed out, an allegation of personal bias must be based on an "extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." United States v. Grinnell Corp., 384 U.S. 563, 583 (1966). Adverse rulings alone are insufficient grounds for disqualification, Green v. Dorrell, 969 F.2d 915, 919 (10th Cir. 1992), cert. denied, 113 S. Ct. 1336 (1993), as is evidence that the judge criticized or was angry with a party, United States v. Troxell, 887 F.2d 830, 833-34 (7th Cir. 1989). Therefore, the bankruptcy judge did not abuse his discretion by refusing to recuse himself.

To obtain mandamus relief, Mr. Lopez must demonstrate a "'clear and indisputable'" right to relief. Will v. United States, 389 U.S. 90, 96 (1967) (quoting Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 384 (1953)). Because we conclude the bankruptcy judge did not abuse

his discretion in refusing to recuse himself, it follows that Mr. Lopez cannot meet the higher mandamus standard.

Mr. Lopez lacks standing to challenge the orders appealed from in Nos. 93-2042B and 93-2141. In No. 93-2042B, Mr. Lopez challenges a bankruptcy court order that lifted the automatic stay as to Val & Sons so that it could foreclose on its mortgage on the debtors' building. Although Mr. Lopez apparently has an indirect interest in the challenged order because any disposition of estate assets presumably affects the eventual payment or nonpayment of his administrative claim, Mr. Lopez asserts no interest in the building which was subject to foreclosure due to the bankruptcy court's order lifting the automatic stay. Therefore, he has failed to assert a direct and adverse pecuniary interest in the order appealed from in No. 93-2042B, and has failed to establish standing.

It is also true that the automatic stay is for the sole benefit of the debtors' estate.

Tilley v. Vucurevich (In re Pecan Groves of Ariz.), 951 F.2d 242, 245 (9th Cir. 1991). The trustee may challenge an order lifting the stay, but it could subvert the trustee's powers to allow a creditor to appeal if the trustee chooses not to. Id. Here, the trustee stipulated to lifting the stay in the first place.

In No. 93-2141, Mr. Lopez appeals from an order granting fees to the Chapter 7 trustee's accountant. As indicated above, although Mr. Lopez apparently has an indirect interest in any order disposing of the debtors' funds, he asserts no direct interest in the actual funds distributed by the challenged order. Cf. In re International Envtl. Dynamics, Inc., 718 F.2d at 326 (claimant sought portion of funds disposed of by challenged order). That is, if paying the Chapter 7 accountant means that Mr. Lopez will not get paid, or if not paying the Chapter 7 accountant means that Mr. Lopez will get paid, Mr. Lopez has failed to demonstrate how either

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: AMERICAN READY MIX, INC., Debtor, and ALBUQUERQUE SAND & GRAVEL, INC., d/b/a AMERICAN SAND & GRAVEL, INC., Debtor.	)	
ANDREW LEO LOPEZ, Appellant, v. DANIEL J. BEHLES, Trustee; WESTERN BANK; ANTHONY TAFOYA, Debtor in Possession, Appellees.	)	No. 93-2257 (D.C. No. CIV-91-532-JP) (D. N.M.)

ORDER AND JUDGMENT*

Before ANDERSON and KELLY, Circuit Judges, and BELOT,** District Judge.

**Honorable Monti L. Belot, District Judge, United States District Court for the District of Kansas, sitting by designation.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1993. 151 F.R.D. 470.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 24(1); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Appellant Andrew Leo Lopez, representing himself, challenges an order of the bankruptcy court which approved a stipulated order lifting the automatic stay in the underlying consolidated bankruptcies as to appellee Western Bank so that Western could foreclose on its security interest in some equipment belonging to one of the debtors. Appellant, formerly a professional employee of the debtors, is not a "person aggrieved" by the order he challenges, and he therefore lacks standing to appeal. See

Lopez v. Behles (In re American Ready Mix, Inc.), 14 F.3d 1497, 1500 (10th Cir. 1994) (appellant must demonstrate direct and adverse pecuniary interest in order appealed from).

Therefore, this appeal is DISMISSED.

The mandate shall issue forthwith.

Entered for the Court

Monti L. Belot
District Judge

APPENDIX C

Statutes Involved

11 U.S.C. § 101(5) "Claim" means

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to equitable remedy for breach of performance if such breach gives rise to a right of payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

11 U.S.C. § 101(10)(A) "Creditor" means

Entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor.

11 U.S.C. § 101(14)(E) Disinterested persons means

Person that does not have an interest materially adverse to the interest of the estate

or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor or an investment banker specified in subparagraph (B)(C) of this paragraph, or for any other reason;

11 U.S.C. § 301 Voluntary cases

A voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter. The commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter.

11 U.S.C. § 327(a) Employment of professional persons

Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, and other professional persons, that do not hold or represent an interest adverse to the estate, and that are

disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

11 U.S.C. § 348(a) Effect of conversion

Conversion of a case under one chapter of this title to a case under another chapter of this title constitutes an order for relief under the chapter to which the case is converted....

11 U.S.C. § 362 Automatic stay

Except as provided in subsection (b) of this section, a petition filed under § 301, § 302, or § 303 of this title or an application filed under section 5(a)(3) of the Securities Investor Act of 1970 (15 U.S.C. 78eee(a)(3), operates as a stay applicable to all entities, of --

11 U.S.C. § 363(b)(1) Use, sale, or lease of property

The trustee, after notice and hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.

11 U.S.C. § 501(a) Filing of proofs of claims or interests

A creditor or an indenture trustee may file a proof of claim.

11 U.S.C. § 502(a) Allowance of claims or interests

A claim or interest, proof of which is filed under § 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under Chapter 7 of this title objects.

11 U.S.C. § 503(b)(4) Allowance of administrative expenses

After notice and hearing, there shall be allowed administrative expenses, other than claims allowed under § 502(f) of this title including --

(4) reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under paragraph (3) of this subsection

based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant.

11 U.S.C. § 507(a)(1) Priorities

The following expenses and claims have priority in the following order:

(1) First, administrative expenses allowed under § 503(b) of this title, and any fees and charges assessed against the estate under chapter 123 of title 28.

11 U.S.C. § 1109(b) Right to be heard

A party in interest, including the debtor, the trustee, a creditor's committee, an equity security holder's committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.

28 U.S.C. § 455(a) Disqualification of justice, judge, or magistrate

Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

28 U.S.C. § 455(b)(1) Disqualification of justice, judge, or magistrate

He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

28 U.S.C. § 1293(b) Bankruptcy appeals

Notwithstanding section 1482 of this title [28 U.S.C. § 1482] a court of appeals shall have jurisdiction of an appeal from a final judgment, order, or decree of an appellate panel created under section 160 [28 U.S.C. § 160] or a district court of the United States or from a final judgment, order, or decree of a bankruptcy court of the United States if the parties to such appeal agree to a direct appeal to the

court of appeals.

28 U.S.C. § 1651(a) Writs

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Fed. R. Civ. P. § 24(a)(2) Intervention

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Supreme Court, U.S.
FILED
JUN 1 1994
OFFICE OF THE CLERK

(4)

No. 93-1972

SUPREME COURT OF THE UNITED STATES

October Term, 1993

ANDREW LEO LOPEZ,

Petitioner,

vs.

DANIEL J. BEHLES, *et al.*,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

APPENDIX TO PETITIONER'S PETITION FOR *WRIT OF CERTIORARI*

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

In re:

ANDREW LEO LOPEZ, MBA, CPA,

Plaintiff-Appellant,

vs. CIVIL NO. 91-110-JB/RWM

DANIEL BEHLES, Trustee for American Ready Mix, Inc., and Albuquerque Sand & Gravel, Inc., and WESTERN BANK,

Defendant-Appellees.

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court upon appellant Andrew Leo Lopez's appeal from an Order of the Bankruptcy Court approving the payment of professional fees to accountant Harold Field, who was hired by the bankruptcy estate. See January 11, 1991 Order authorizing fees incurred by the accountant. After review of the memoranda of the parties, the record on appeal and the applicable law, the Court concludes that the Order of the Bankruptcy Court should be affirmed.

Appellant claims that the accountant's fees

should not have been authorized for several reasons. First, appellant claims that the accountant's fee, although a reasonable hourly rate, was not reasonable in this instance because the same services could have been obtained from a company offering temporary accountant's services. Second, appellant claims that the accountant charged the estate for work that exceeded the scope of his employment. Third, appellant claims that the accountant's actions were incompetent and violated ethical standards for accountants. Fourth, appellant claims that the accountant made negligent misrepresentations in performing his professional duties.

This Court must review the Bankruptcy Court's factual findings under a clearly erroneous standard; the legal determinations are reviewed de novo. *Re Unioil, Inc.*, 962 F.2d 988, 990 (10th Cir. 1992); *In re Burkart Farm & Livestock*, 938 F.2d 1114, 1115 (10th Cir. 1991). All of appellant's assertions attack the

findings of fact made by the Bankruptcy Court. Therefore this Court must find clear error in order to reverse the Bankruptcy Court.

Although plaintiff made numerous conclusory allegations in his briefs to this Court, and at the hearing before the Bankruptcy Court, none of the allegations are supported with positive evidence. In contrast, the findings made by the Bankruptcy Court are supported by ample evidence in the record. Without belaboring each allegation made by appellant, suffice it to say that the record clearly supports the Bankruptcy Court's findings are not clearly erroneous, and they will not be disturbed.

Appellant also argues in his reply brief that because the Trustee has a conflict of interest he must be disqualified, and should disgorge all fees and expenses paid to him by the debtor's estate. It does not appear that this issue was raised before the Bankruptcy Court. Except for jurisdictional issues, claims not presented to the court below may not be

considered by this Court upon appeal. *Matter of Kroner*, 953 F.2d 317, 319 (7th Cir. 1992); see also *In re Edmonds*, 924 F.2d 176, 181 n. 3 (10th Cir. 1991). This Court declines to consider appellant's arguments regarding the Trustee.

IT IS THEREFORE ORDERED that the Order of the United States Bankruptcy Court for the District of New Mexico authorizing the accountant's fees is affirmed.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

IN RE:

ANDREW LEO LOPEZ, MBA, CPA,

Plaintiff-Appellant,

vs. CIVIL NO. 91-482-SC/RWM

DANIEL BEHLES, TRUSTEE, for
American Ready Mix, Inc., and
Albuquerque Sand and Gravel and
U. S. BANKRUPTCY COURT,

Defendants-Appellees.

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court upon Appellant Andrew Leo Lopez' appeal from an Order of the Bankruptcy Court denying Appellant's Motion to Recuse or Disqualify the Bankruptcy Judge.[1] After review of the record on appeal, the memoranda of the parties and the applicable law, the Court concludes that the Order of the Bankruptcy Court should be affirmed.

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[1] This cause number consists of two distinct appeals from Bankruptcy Orders. This Memorandum Opinion and Order relates to the recusal issue. A separate Memorandum Opinion and Order will be entered relating to the "Val & Sons" issue.

Appellant, an accountant formerly employed by the debtor, appeals the Bankruptcy Judge's refusal to recuse himself. Some background facts will clarify Appellant's argument. At a hearing on a motion for conversion from a Chapter 11 reorganization to a Chapter 7 bankruptcy, held on October 23, 1990, counsel for the New Mexico Department of Taxation introduced into evidence a letter written by Appellant to the New Mexico Department of Taxation and Revenue. Apparently the debtor had been remiss in making various state and federal tax payments. See Partial Transcript of hearing In re: American Ready Mix, Inc., No. 11-89-02832 RA, October 23, 1990, at 9-11, 78, 86, 103, 130-31. The letter in question, although apparently not before the Court, appears to have been an accusation by Appellant that the New Mexico Department of Taxation and Revenue was responsible for the death of debtor's chief accountant because the State accused the accountant of failing to file tax returns. See

transcript of April 25, 1991, hearing, at 11. The Department of Taxation and Revenue's Motion for Conversion was ultimately granted. See Order of Conversion, entered October 24, 1990.

On April 18, 1991 Appellant filed a Motion to Recuse or Disqualify Presiding Judge. The motion stated as grounds, in part, that counsel for the debtor asked Appellant not to appear at the hearing on the Motion to Stay the Order to convert because Appellant's presence would influence the Court to rule against debtor. Appellant claims that the Bankruptcy Judge was biased against Appellant's employer, the debtor, because of the letter that Appellant wrote to the New Mexico Department of Taxation and Revenue. See Transcript of January 11, 1991 hearing at 27. Appellant claims that this bias resulted in an erroneous order converting the reorganization into a Chapter 7 bankruptcy. On May 2, 1991 the Bankruptcy Judge denied the motion for recusal, and plaintiff appealed to this Court.

28 U.S.C.§ 455(b)(1) provides that a justice, judge or magistrate of the United States shall disqualify himself "[w]here he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." The standard of appellate review on questions of recusal is whether the judge abused his discretion in not disqualifying himself. ***United States v. Probst***, 792 F.2d 111 (8th Cir. 1986); ***United States v. Bonilla***, 626 F.2d 177 (1st Cir. 1980); ***United States v. Haldeman***, 559 F.2d 31, 139 n. 359 (D.C. Cir.); ***cert denied***, 431 U.S. 933 (1976).

Ordinarily the personal bias must exist outside the lawsuit. "The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." ***United States v. Grinnell Corp.***, 384 U.S. 563, 583 (1966). It is clear that a judge need not step down merely because he has made

remarks critical of, or has otherwise expressed displeasure with, a party or a lawyer. ***United States v. Troxell***, 887 F.2d 830 (7th Cir. 1989) (recusal not required where defendant claimed she overheard an unidentified person say the judge must be angry, where no demonstration of actual bias or prejudice); ***United States v. Burt***, 765 F.2d 1364 (9th Cir. 1985). "[A]dverse rulings against a litigant cannot in themselves form the appropriate grounds for disqualification." ***Green v. Dorrell***, 969 F.2d 915, 919 (10th Cir. 1992).

In this case, any displeasure that the Bankruptcy Judge expressed was clearly the result of reading the letter introduced into evidence during the October 23, 1990 hearing. Thus, the alleged bias was not from an extrajudicial source. It is clear as well that the judge's rulings on the merits were supported by the other evidence adduced at the hearings, and were not based upon any personal animosity towards appellant. The Bankruptcy Judge

therefore did not abuse his discretion in refusing to recuse himself.

IT IS THEREFORE ORDERED that the Order of the United States Bankruptcy Court for the District of New Mexico denying appellant's motion to recuse or disqualify presiding bankruptcy judge is AFFIRMED.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

In re:

ANDREW LEO LOPEZ, MBA, CPA,

Plaintiff-Appellant,

vs. CIVIL NO. 91-482-JP/RWM

DANIEL BEHLES, Trustee, for American Ready Mix, Inc., and Albuquerque Sand and Gravel, Inc., VAL & SONS, INC., VALENTIN TRUJILLO, and WESTERN BANK.

Defendants-Appellees.

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court upon Appellant Andrew Leo Lopez' appeal from an Order of the Bankruptcy Court lifting the automatic stay, thereby allowing creditor Val & Sons to foreclose on its mortgage on certain business premises of debtor. See Stipulated Order Lifting Automatic Stay, filed May 2, 1991.[1]

---

[1] This cause number consists of two distinct appeals from Bankruptcy Orders. This Memorandum Opinion and Order relates to the lifting of the stay allowing Val & Sons to foreclose on a mortgage. A separate Memorandum Opinion and Order will be entered relating to the recusal issue.

After review of the memoranda of the parties and the applicable law, the Court concludes that the Order of the Bankruptcy Court should be affirmed.

Appellant raises several issues in this appeal.[2] Some of them relate directly to the lifting of the stay which allowed Val & Sons to foreclose upon its mortgage, and others address peripheral matters. Plaintiff first complains that he did not receive adequate notice of the hearing on the lifting of the automatic stay. Plaintiff was present nonetheless, because another hearing in the same case was scheduled immediately after the hearing in question. Plaintiff doesn't claim that the lack of adequate notice prejudiced him in any way. Indeed, the fact that Plaintiff was present at the hearing eliminates any prejudice that Plaintiff might have suffered by not receiving

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[2] The Court assumes that the thrust of Plaintiff's appeal is the above-mentioned Order lifting the stay, although Plaintiff does not cite to the Order or refer to it directly.

proper notice. With respect to Plaintiff's claim that all parties in interest should have been given notice of the hearing, the Court notes that Plaintiff does not represent the class of interested parties, and therefore has no standing to raise this issue.

Plaintiff recognizes that the fact that the property has already been sold may lead to the conclusion that the matter is moot. However, Plaintiff claims that because the Bankruptcy Court made no determination that Val & Sons was a good faith purchaser, and because there was no hearing on the value of the asset, this court should either remand the matter to the Bankruptcy Court or should hold the hearings itself.

If a stay of an order of a bankruptcy court is not obtained pending appeal, and assets are sold to satisfy the claims of a creditor, the appeal from the lifting of the automatic stay is generally moot. See In re Sun Valley Ranches, Inc., 823 F.2d 1373, 1374-75 (9th Cir. 1987).

The Court recognized an exception to the general rule where the sale of real property is sold to a creditor who is a party to the appeal, and the debtor appeals. Id. The exception does not apply in this case because the trustee agreed to the entry of the Order lifting the automatic stay. See Stipulated Order Lifting Automatic Stay, filed May 2, 1991.

As explained in this Court's December 30, 1991 Memorandum Opinion and Order dismissing Plaintiff's appeal in the companion case Civil No. 91-532 JP/RWM, Bankruptcy Rule 8005 allows an aggrieved party to seek a stay of an order of a bankruptcy court pending appeal. The purpose of Rule 8005 is to protect the interest of good faith purchasers. In re Suchy, 786 F.2d 900, 902 (9th Cir. 1985). Plaintiff claims that the Bankruptcy Court made no finding regarding the good faith of the purchaser, or of the value of the property, yet Plaintiff fails to assert that these issues were raised before the Bankruptcy Court. Plaintiff admits that he was present at

the hearing, yet there is no evidence that he presented these arguments to the Bankruptcy Judge. It is axiomatic that, except for jurisdictional issues, claims not presented to the Court below may not be considered by a court upon appeal. **Matter of Kroner**, 953 F.2d 317, 319 (7th Cir. 1992); **see also In re Edmonds**, 924 F.2d 176, 181 n.3 (10th Cir. 1991).

Finally, Plaintiff claims that the Trustee in the bankruptcy case had conflicts of interest, and therefore was not disinterested in the outcome of the proceedings. Plaintiff fails to support these assertions with any facts supported by the record or any other evidence. Plaintiff's allegations regarding the Trustee are not well-taken.

IT IS THEREFORE ORDERED that the Order of the United States Bankruptcy Court for the District of New Mexico lifting the automatic stay regarding Val & Sons is affirmed.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

In re:

ANDREW LEO LOPEZ, MBA, CPA,

Plaintiff-Appellant,

vs. CIVIL NO. 91-532-JP/RWM

DANIEL BEHLES, Trustee, for American Ready Mix, Inc., and Albuquerque Sand and Gravel, Inc., VAL & SONS, INC., VALENTIN TRUJILLO, and WESTERN BANK.

Defendants-Appellees.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court upon defendant-appellee Western Bank of Albuquerque, New Mexico's Motion to Dismiss Appeal of Andrew Leo Lopez, filed June 24, 1991. Before reaching the merits of this motion, it is necessary for the Court to clarify certain aspects of this case and of related case Civil No. 91-110-JP/RWM, styled In re: Andrew Leo Lopez, MBA, CPA v. Daniel Behles, et al.

91-110-JP/RWM

The appeal numbered 91-110-JP/RWM is an

appeal of the Bankruptcy Court's Order to pay accountant's fees. On June 13, 1991, I entered an Order in 91-110 striking certain filings by Andrew Leo Lopez, a creditor in the underlying bankruptcy. My Order struck the Emergency Motion Pursuant to Federal Rules of Civil Procedure 76 and Bankruptcy Rule 8005 for Stay of United States Bankruptcy Court Orders and Motion to Consolidate Appeals under 8011. I struck these filings because they related to an Order entered by the Bankruptcy Court on May 21, 1991 granting the Motion to Approve Stipulated Agreement Terminating Automatic Stay, which Order was not appealed in 91-110. The filings did not relate to the appeal in 91-110 regarding accountant's fees. The Order to which Plaintiff's filings related allowed Western Bank, a creditor, to foreclose on its security interest in certain collateral. On page 2 of my Order I stated that "if Mr. Lopez desires to proceed with an appeal from the Order entered May 21, 1991 by the Bankruptcy Judge terminating

the automatic stay as to Western Bank of Albuquerque, he may do so if he complies with D.N.M L.R.-Bk 9 provided the time for filing an appeal has not yet expired." At the time I entered this Order, I was unaware that Mr. Lopez had already filed his appeal on the Western Bank issue. The case was No. 91-532, the instant case, which at that time was assigned to Judge Mechem.

On June 24, 1991, several days after entry of my Order, Western Bank filed its Motion to Dismiss Appeal of Andrew Leo Lopez. Unfortunately, Western Bank filed the motion in 91-110, instead of in 91-532 M. On July 16, 1991, in considering Western Bank's Motion to Dismiss Appeal, and still unaware that 91-532 existed, I determined that Western Bank's Motion was moot because of my earlier Order striking Mr. Lopez' pleadings relating to Western Bank. After my Order was entered, I was advised of the appeal number 91-532 assigned to Judge Mechem. Judge Mechem transferred the case to me on

August 20, 1991.

After reviewing both files, it is apparent that Western Bank's Motion to Dismiss Appeal of Andrew Leo Lopez, filed June 24, 1991 in Civil No. 91-110-JP/RWM was in actuality a Motion to Dismiss that should have been filed in 91-532. Therefore, that part of my July 16, 1991 Order which dismissed Western Bank's Motion to Dismiss Appeal as moot is vacated and I will now consider the merits of the Motion to Dismiss as if it had been filed in 91-532-JP/RWM.

Motion to Dismiss

This appeal is from an order of the Bankruptcy Court approving the Motion to Approve Stipulated Agreement Terminating Automatic Stay, entered May 21, 1991. This Order allowed Western Bank of Albuquerque to proceed in its efforts to foreclose upon its security interests in certain collateral which secured an indebtedness owed to Western Bank by the debtor in the Bankruptcy. Although Mr. Lopez filed this appeal from that Order, he did not obtain

a stay of the Order from the Bankruptcy Court.[1] On May 29, 1991, Western Bank held a sale, and the collateral, mining equipment, was sold. Western Bank therefore seeks an Order dismissing this appeal on the grounds that the sale has already occurred, rendering this appeal moot. Mr. Lopez' response to Western Bank's arguments is that this Court "declined jurisdiction over this appeal", Western Bank's request for dismissal should be denied. See Reply to appellee's Memorandum Brief to Dismiss Appellant's Appeal, filed July 8, 1991. In

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[1] Mr. Lopez filed a Motion for a Stay, but filed it in 91-110, instead of in 91-532, which led to my Order striking the Motion. In addition, Mr. Lopez sought the stay from the District Court instead of from the Bankruptcy Court. See Bankruptcy Rule 8005. Rule 8005 requires that any motion for a stay pending appeal that is made to the district court "shall show why the relief ... was not obtained from the bankruptcy judge." Even if I had not stricken the Motion for being filed in the wrong file, I would have denied the Motion for failure to comply with Bankruptcy Rule 8005. See *In re Petrusch*, 14 B.R. 825 (N.D.N.Y. 1981), *affm'd*, 667 F.2d 297 (9th Cir. 1981), *cert. denied*, 456 U.S. 974 (1982) (Court has power to stay Order of Bankruptcy Court as long as relief is first sought from Bankruptcy Court).

claiming that I had declined jurisdiction over the appeal, Mr. Lopez apparently refers to my June 13, 1991 Order striking his pleadings regarding the Western Bank appeal. As discussed above, however, I will consider the Motion to have been filed in the proper case, 91-532, and will rule upon the Motion to Dismiss on the merits.

Bankruptcy Rule 8005 provides that a motion for a stay of an order of a bankruptcy court pending appeal should be made to the bankruptcy court. Rule 8005 does not require the aggrieved party to seek a stay. ***In re Highway Truck Drivers & Helpers***, 888 F.2d 293, 297 (3rd Cir. 1989). However, if a stay of an appeal is not obtained, and assets are sold to satisfy the claims of a creditor, the appeal from the lifting of the automatic stay is moot unless it involves the sale of real property to a creditor who is a party on the appeal. **See *In re Sun Valley Ranches, Inc.***, 823 F.2d 1373, 1374-75

(9th Cir. 1987).[2]

The goal of Rule 8005 in requiring a stay is to protect the interests of good faith purchasers. *In re Suchy*, 786 F.2d 900, 902 (9th Cir. 1985). Plaintiff claims in his brief in chief, filed September 13, 1991, that this appeal should not be considered moot because the Bankruptcy Court failed to find that the purchaser of the collateral was a good faith purchaser. Although Mr. Lopez claims that "the [bankruptcy] Court ignored testimony that there may have been collusion among the parties to this transaction", id. at 3, Mr. Lopez fails to cite to the record in support of his assertion. Mr. Lopez also claims that his allegations of collusion are supported by the fact that "based upon information and belief [the purchaser's

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[2] Although Sun Valley involved the debtor's failure to obtain the stay, the reasoning is even more compelling where, as here, it is one of the creditors who fails to obtain a stay. The debtor in the instant case agreed to the lifting of the stay. See Order of Bankruptcy Court Approving Motion to Approve Stipulated Agreement Terminating Automatic Stay, filed May 21, 1991.

financing] was in the form of a note financed by Bank." Id. at 4. (Emphasis in original.) Again, Mr. Lopez cites to no authority, either in the record, or otherwise, to support his claim regarding the financing. Mr. Lopez makes other unverified and unsubstantiated claims that the purchaser should not be considered a good faith purchaser.

The Court finds that Mr. Lopez has not presented any facts in the record to support a finding that the purchaser was not a good faith purchaser. Mr. Lopez' failure to obtain a stay pending appeal has resulted in the sale of the collateral, which renders this appeal moot.

IT IS THEREFORE ORDERED that defendant-appellee Western Bank of Albuquerque, New Mexico's Motion to Dismiss Appeal of Andrew Leo Lopez, filed June 24, 1991 is granted.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

In re:

ANDREW LEO LOPEZ, MBA, CPA,

Plaintiff-Appellant,

vs. CIVIL NO. 91-532-JP/RWM

DANIEL BEHLES, Trustee, for American Ready Mix, Inc., and Albuquerque Sand and Gravel, Inc., VAL & SONS, INC., VALENTIN TRUJILLO, and WESTERN BANK.

Defendants-Appellees.

ORDER

THIS MATTER comes before the Court upon Appellant Andrew Leo Lopez' Motion to Reconsider Appellee's Motion to Dismiss Appeal, filed January 16, 1992, the Court being fully advised, FINDS that the original Memorandum Opinion and Order, which held that Appellant's failure to obtain a stay of the Bankruptcy Court's Order allowing a lifting of the automatic stay resulted in the sale of the collateral, rendering this case moot, was correct.

IT IS THEREFORE ORDERED that Appellant's

Motion to Reconsider Appellee's Motion to Dismiss Appeal is denied.

_____

UNITED STATES DISTRICT JUDGE

93-1972

(2)

Supreme Court, U.S.
FILED
JUN 30 1994
OFFICE OF THE CLERK

IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1993

ANDREW LEO LOPEZ,

Petitioner,

vs. No.

DANIEL J. BEHLES, Trustee; and
WESTERN BANK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT WESTERN BANK'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

1. On October 6, 1989, American Ready Mix, Inc. filed Chapter 11 in the United States Bankruptcy Court, District of New Mexico, in Cause No. 89-02832 MA.

2. On December 19, 1989, its sister corporation Albuquerque Sand and Gravel, Inc. filed Chapter 11 in the United States Bankruptcy Court, District of New Mexico, in Cause No. 89-03609 RA, which was later consolidated into Cause No. 89-02832 MA.

3. On April 5, 1990, the Bankruptcy Court approved an Order in Cause No. 89-02832 MA employing the Petitioner as a Certified Public Accountant to the Debtors-in-Possession.

4. On October 24, 1990, Cause No. 89-02832 MA was involuntarily converted to a Chapter 7 by Motion of the New Mexico Taxation & Revenue Department.

5. On January 2, 1991, Andrew Leo Lopez, CPA, entered an appearance in the case and asked to be added to the matrix.

6. On or about March 5, 1991, the Trustee abandoned the assets securing the Debtor's note to Western Bank.

7. On or about March 6, 1991, Western Bank motioned the bankruptcy court to approve a Stipulated Agreement for Relief From the Automatic Stay on equipment securing American Ready Mix's Note to Western Bank, between Western Bank, the Debtor and the Trustee. Notice of Deadline for Filing Objections was mailed to all creditors, including the Petitioner, on March 6, 1991, and a Supplement to the Notice of Deadline for Filing Objections was mailed to all creditors on March 7, 1991. On March 26, 1991, Andrew Lopez filed an Objection to Western Bank's Motion to Approve a Stipulated Agreement Terminating the Automatic Stay.

8. On May 10, 1991, the bankruptcy court held a hearing upon Western Bank's Motion for Approval of a Stipulated Agreement Terminating the Automatic Stay. Appearing at the hearing

was the Petitioner, who testified as a witness adverse to the Motion and who presented oral arguments to the Court as to why he thought the Motion should be denied. The Court ruled from the bench at the conclusion of the hearing, making specific Findings of Fact and Conclusions of Law in granting Western Bank's Motion.

9. On May 21, 1991, the Court entered an Order approving Western Bank's Motion to Approve a Stipulated Agreement Terminating the Automatic Stay. (See attached Exhibit 1)

10. In the Order, the Court found that the value of the collateral did not exceed the amount of the indebtedness owed to Western Bank and that there was no equity in the collateral for the benefit of the bankruptcy estate. (See attached Exhibit 1)

11. On May 17, 1991, counsel for Western Bank mailed notice to all creditors, including the Petitioner, of the private sale of the collateral to be consummated on May 29, 1991. (See attached Exhibit 2)

12. On May 22, 1991, counsel for Western Bank published in the Albuquerque Journal, the largest circulated newspaper in New Mexico, a Notice of Sale of Assets and Requests for Bids. (See attached Exhibit 3)

13. On May 24, 1991, counsel for Western Bank also published in the Health City Sun, the legal periodical for Albuquerque, New Mexico, a Notice of Sale and Request for Bids for the above-mentioned equipment. (See attached Exhibit 4)

14. Having received no other bids for the equipment, Western Bank sold the equipment in a private sale for $190,000, to a group of investors which included principals of the bankrupt companies.

STANDARD OF REVIEW

Pursuant to Rule 8013, Federal Rules of Bankruptcy Procedure, findings of fact shall not be set aside unless clearly erroneous. Additionally, Rule 52, Fed.R.Civ.P. states that "Findings of fact, whether based on oral or

documentary evidence, shall not be set aside unless clearly erroneous . . ."

Appellate courts review bankruptcy court's legal determinations de novo. In re L.F. Jennings Oil Co., 4 F.3d 887, 888, (10th Cir. 1993); cert.denied, New Mexico Environment Department v. Franco, 114 S. Ct. 1372 (1994); In re Dykes, 10 F.3d 184, 185 (3rd Cir. 1993); In re Ewell, 958 F.2d 276, 279 (9th Cir. 1992); and In re Schultz Manufacturing and Fabricating Co., Inc., 110 Bankr. 384, 387 (N.D. Indiana 1990).

PETITIONER DOES NOT HAVE STANDING TO APPEAL THE BANKRUPTCY COURT ORDERS LIFTING AUTOMATIC STAY

The underlying Bankruptcy Court Order, which is involved in this appeal, is the court approved Stipulated Order entered into by Western Bank, the Debtor and the Chapter 7 Trustee lifting the automatic stay and allowing Western Bank to proceed to sell certain equipment which secured loans from Western Bank to the Debtor.

The right of appellate review in bankruptcy

proceedings has historically been limited "persons aggrieved", i.e., those persons whose rights or interests are directly and adversely affected pecuniarily by an order or decree of the bankruptcy court. In re El San Juan Hotel, 809 F.2d 151, 154 (1st Cir. 1987). "A litigant qualifies as a person aggrieved if the order diminishes his property, increases his burdens, or impairs his rights." Id.

The majority of the circuits have adopted the "aggrieved persons" standard for determining appellate standing in bankruptcy. In re El San Juan Hotel, at 154; International Trade Administration v. Rensselaer Polytechnic Institute, 936 F.2d 744, 747 (2nd Cir. 1991); Willemain v. Kivitz, 764 F.2d 1019, 1022 (4th Cir. 1985); Matter of Dupage Boiler Works, Inc., 965 F.2d 296, 297 (7th Cir. 1992), cert.denied, Scherl v. Fisher, 113 S.Ct. 409; In re Dykes, 10 F.3d 184, 188 (3rd Cir. 1993); Tilley v. Vucurevich (In re Pecan Groves of Arizona) 951 F.2d 242, 245 (9th Cir. 1991); Holmes v. Silver

Wings Aviation, Inc., 881 F.2d 939, 940 (10th Cir. 1989).

The "persons aggrieved" test insures the bankruptcy proceedings are not unreasonably delayed by protracted litigation by allowing only those persons whose interests are directly affected by a bankruptcy order to appeal. Matter of Dupage Boiler Works, Inc., 965 F.2d 296, 297 (7th Cir. 1992). ". . . if appellate jurisdiction is not limited, bankruptcy litigation will become mired in endless appeals brought by a myriad of parties who are indirectly affected by every bankruptcy court order". Holmes v. Silver Wings Aviation, Inc., at 940 (quoting Kane v. Johns-Manville Corp., 843 F.2d 636, 642 (2nd Cir. 1988)).

On occasion even Debtors have been held not to have standing to appeal an order of the bankruptcy court. Holmes v. Silver Wings Aviation, Inc, at 940; Willemain v. Kivitz, at 1022-1023. Even a debtor's wife has been held not to have standing to appeal a bankruptcy

court order. Matter of Fondiller, 707 F.2d 441 (9th Cir. 1983). Likewise, unsuccessful bidders for purchase of Chapter 11 debtors' property have been held to lack standing as an "aggrieved person" to appeal a bankruptcy court order. In re Broadmoor Place Investments, 994 F.2d 744, 746 (10th Cir. 1993), cert.denied, G-K Development Co., Inc. v. Broadmoor Place Investments, 114 S.Ct. 877 (1994).

The general rule is that the Chapter 7 trustee of a corporation's bankruptcy estate has standing to contest a settlement on behalf of the corporation's unsecured creditors and shareholders. In re Schultz Manufacturing & Fabricating Co., 956 F.2d 686, 690 (7th Cir. 1992). Generally, in bankruptcy proceedings, unsecured creditors and shareholders of a corporation do not have standing to contest bankruptcy court orders. Id. at 690; Tilley v. Vucurevich, at 245.

In very limited circumstances, a few courts have recognized a narrow exception to the

general rule that trustees are the appropriate representatives of unsecured creditors in challenging bankruptcy court orders. The Seventh Circuit Court of Appeals has held that unsecured creditors can ask the Court for authority to appeal in the name of the trustee, if the trustee refuses to act. Matter of Carbide Cutoff, Inc., 703 F.2d 259, 264 (7th Cir. 1983). In the event a general creditor is dissatisfied with the conduct of the trustee in not litigating a claim, his recourse is to move the bankruptcy court for an order requiring the trustee to prosecute the claim or permit the creditor to appeal if the trustee declines to do so. Wells v. Dickinson, 403 F.2d 635, 636 (6th Cir. 1968); Matter of Shelby Motel Group, Inc., 123 Bankr. 98, 102 (N.D. Ala. 1990).

Another exception to the general rule is when there is a surplus from the sale of an asset, whereby the creditors would be adversely and directly affected by the bankruptcy court order. Matter of Andreucetti, 975 F.2d 413, 417

(7th Cir. 1992) (hopelessly insolvent debtor does not have standing to appeal).

Neither of the above-mentioned exceptions apply in this case. The Petitioner had an unsecured, administrative claim under the Chapter 11 bankruptcy. Prior to his application for payment of funds from the bankruptcy estate, the case was involuntarily converted to a Chapter 7 bankruptcy. At that time, any claims of the Petitioner for accountant fees against the estate dropped in priority behind the Chapter 7 administrative expenses. 11 U.S.C. §348(d); 11 U.S.C. §507(a)(2); 11 U.S.C. §502(f); 11 U.S.C. 726(b); In re Energy Cooperative, Inc., 55 Bankr. 957, 968 (Bankr. N.D.Ill. 1985). Curiously, the Petitioner has never filed a fee application with the bankruptcy court and thus may not occupy a position as a creditor.

As a potential Chapter 7 unsecured creditor, Petitioner does not have standing to appeal any order of the bankruptcy court. The

Petitioner never moved the court for an order requiring the trustee to deny the lifting of the stay or to permit Petitioner to appeal any order for the trustee. Additionally, there was no possibility of excess funds being realized on the sale of the assets securing the Western Bank Note. Thus, the Petitioner does not have standing to appeal the Bankruptcy Court Order lifting the stay under either of the exceptions to the general rule denying appellate standing to unsecured creditors.

Petitioner also claims he has a right to intervene in Cause No. 89-02832 MA and thus has standing to appeal as an intervenor. Pursuant to Bankruptcy Rule 2018(a), the court may permit any interested entity to intervene. However, creditors are not entitled to intervene as a matter of right in an involuntary petition, rather it is within the court's discretion. In re Kujawa, 112 Bankr. 968 (E.D. Mo. 1990). Additionally, a creditor with a contingent claim does not have standing to intervene. Id, at 970

(must satisfy requirements for petitioning creditors in 11 U.S.C. §303(c)). Petitioner has never filed a claim in this case and never petitioned to the court to intervene in Cause No. 89-02832 MA, thus he is not eligible to appeal as an intervenor.

The Petitioner's due process rights were not violated by his inability to appeal the Order of the bankruptcy court. The Petitioner was notified of the lifting of the stay, was notified of the hearing and in fact appeared and participated in the hearing. The Petitioner has been afforded all rights to which he is entitled under due process. See Matthews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893 (1976). The Petitioner's Petition for Writ of Certiorari should be denied.

THE APPEAL OF THE RELEASE OF THE STAYS SHOULD BE DISMISSED AS MOOT

An appeal from the decision of the bankruptcy court must be dismissed as moot if an event occurs while the appeal is pending that

makes it impossible for an appellate court to grant any effective relief to the prevailing party. In re Chateaugay Corporation., 10 F.3d 944, 949 (2nd Cir. 1993). The existence of case or controversy is a constitutional prerequisite to the jurisdiction of the federal courts. In re L.F. Jennings Oil Co., 4 F.2d 887, 888 (10th Cir. 1993); See also, In re Servico, Inc., 161 Bankr. 297, 300 (S.D. Fla. 1993).

Where an automatic stay is lifted, the appellee's failure to obtain a stay pending appeal renders an appeal moot after assets in which the creditor had an interest in are sold. In re Mark Bell Furniture Warehouse, Incorporated., 992 F.2d 7, 8 (1st Cir. 1993); In re L.F. Jennings Oil Co., at 888; In re Abbotts Dairies of Pennsylvania, Inc., 788 F.2d 143, 150 (3rd Cir. 1986); See, In re March, 988 F.2d 498, 499 (4th Cir. 1993); cert.denied, Kittay v. Farmers Bank, 114 S.Ct. 182; In re Sullivan Central Plaza I, Ltd., 914 F.2d 731, 733 (5th Cir. 1990); Markstein v. Massey

Associates, Ltd, 763 F.2d 1325, 1327 (11th Cir. 1985). See also, 11 U.S.C. §363(m)(1).

In order for the mootness doctrine to take effect, the sale must be to a good faith purchaser, i.e. one who buys in good faith and for value. In re Ewell, 958 F.2d 276, 281 (9th Cir. 1992); In re Mark Bell Furniture Warehouse, Incorporated, at 8. Lack of good faith can be shown by fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take gross unfair advantage of other bidders. In re Ewell at 281; In re Mark Bell Furniture Warehouse, Incorporated, at 8. Lack of good faith is determined by fraudulent conduct during the sale proceedings. In re Suchy, 786 F.2d 900, 902 (9th Cir. 1986).

The Petitioner has alleged that the sale of the assets by Western Bank was done fraudulently, in collusion with the Debtor, and at too low of a price. These are all factual assertions which Western Bank believes are false, but, more important than their falsity,

is that these assertions are unsupported in any record. The sale of the assets was done by private sale, to a group of investors which included the debtor. Notice of the sale was sent to all creditors and requests for bids were published in The Albuquerque Journal, the newspaper with the largest circulation in New Mexico, and the Health City Sun, the legal notice periodical for the City of Albuquerque. The equipment was sold for the amount due on the outstanding loan to the Chapter 7 Debtor, American Ready Mix, Inc. The bankruptcy court determined this was a fair value for the equipment when it approved the Stipulated Order. There was no fraud or collusion in the sale, as such the sale was to a good faith purchaser.

The Petitioner never applied for a stay of the sale of the equipment by Western Bank. Western Bank subsequently sold this property in which it had a security interest in, so that any decision on appeal would be moot. Thus there is no case in controversy and the federal courts do

not have jurisdiction over this issue. The Petition for Writ of Certiorari should be denied.

PETITIONER'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED WHEN THE BANKRUPTCY COURT JUDGE REFUSED TO DISQUALIFY HIMSELF

The Petitioner moved the Bankruptcy Court Judge to recuse himself on the basis of bias. This claimed bias apparently arises from adverse rulings against the Petitioner during the pendency of the Chapter 7 bankruptcy. Adverse rulings against a litigant cannot, in themselves, form the appropriate grounds for disqualification of a judge. United States v. Grinnell Corporation, 384 U.S. 563, 583, 86 S.Ct. 1698, 1710 (1966); Green v. Dorrell, 969 F.2d 915, 919 (10th Cir. 1992); cert.denied, 113 S.Ct. 1336 (1993).

In only the most extreme cases of bias or prejudice is disqualification of a judge constitutionally required. Aetna Life Insurance v. Lavoie, 475 U.S. 813, 820, 106 S.Ct. 1580,

1584 (1986). Any prejudice must be personal and extra-judicial in order for the due process requirements under the constitution to require disqualification of a district judge. United States v. Carignan, 600 F.2d 762, 764 (9th Cir. 1979); United States v. Prichard, 875 F.2d 789 (10th Cir. 1989); Jaffree v. Wallace, 837 F.2d 1461, 1465 (11th Cir. 1988).

The Petitioner has not alleged any personal bias from an extra-judicial source. He has only alleged that there is personal bias resulting from his conduct in the court hearings which has resulted in adverse rulings in the bankruptcy court. Consistent adverse rulings without more do not constitute judicial animosity sufficient to deprive a person of a fair trial. United States v. Mobile Materials, 881 F.2d 866 (10th Cir. 1989), cert.denied, Philpot v. United States, 493 U.S. 1043, 110 S.Ct. 837 (1990).

The Petitioner's due process rights have not been violated by the failure of the bankruptcy judge to recuse himself. This court

should not grant the Petitioner's Petition for Certiorari as the bankruptcy court's ruling, the district court ruling and the Tenth Circuit Court of Appeals rulings are correct in denying the recusal of the bankruptcy court judge and in denying the appeal on this issue.

CONCLUSION

The Supreme Court of the United States should not grant Petitioner's Petition for a Writ of Certiorari because Petitioner does not have standing to appeal the Orders of the bankruptcy court releasing the automatic stay so that the secured party Western Bank could sell the property securing its loans to the debtor, American Ready Mix. Furthermore, there is no case or controversy as to the lifting of the stay because the matter is moot due to the fact Petitioner never sought a stay pending appeal and that the equipment was sold to good faith purchasers.

Additionally, the Supreme Court of the United States should not grant Petitioner's

Petition for a Writ of Certiorari as to the issue of recusal or disqualification of the bankruptcy court judge because the Petitioner has not alleged any personal and extra-judicial bias which would interfere with his due process rights to a fair trial or hearing.

RESPECTFULLY SUBMITTED,

DUBOIS, CAFFREY, COOKSEY & BISCHOFF, P.A.

By_____

JOHN F. CAFFREY
Attorneys for Respondent Western Bank
2040 Fourth St., NW
Albuquerque, NM 87102
(505) 243 6721

APPENDIX A

STATUTES

FEDERAL RULES OF BANKRUPTCY PROCEDURE

RULE 2018(a): Intervention; Right to Be Heard

> (a) Permissive intervention. In a case under the Code, after hearing on such notice as the court directs and for cause shown, the court may permit any interested entity to intervene generally or with respect to any specified matter.

RULE 8013: Disposition of Appeal; Weight Accorded Bankruptcy Judge's Findings of Fact

> On an appeal the district court or bankruptcy appellate panel may affirm, modify, or reverse a bankruptcy judge's judgment, order, or decree or remand with instructions for further proceedings. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses. (Amended Aug. 1 1987.)

FEDERAL RULES OF CIVIL PROCEDURE

RULE 52: FINDINGS BY THE COURT

> (a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions

the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 41(b).

UNITED STATES CODE

11 U.S.C. §303 Involuntary cases

(c) After the filing of a petition under this section but before the case is dismissed or relief is ordered, a creditor holding an unsecured claim that is not contingent, other than a creditor filing under subsection (b) of this section, may join in the petition with the same effect as if such joining creditor were a petitioning creditor under subsection (b) of this section.

11 U.S.C. §348. Effect of conversion

(d) A claim against the estate or the debtor that arises after the order for relief but before conversion in a case that is converted under section 1112 or 1307 of this title [11 USCS §§1112, 1307], other than a claim specified in section 503(b) of this title [11 USCS §503(b)], shall be treated for all purposes as if such claim had arisen immediately before the date of the filing of the petition.

11 U.S.C. §502. Allowance of claims or interests

(f) In an involuntary case, a claim arising in the ordinary course of the debtor's business or financial affairs after the commencement of the case but before the earlier of the appointment of a trustee and the order for relief shall be determined as of the date such claim arises, and shall be allowed under subsection (a),(b), or (c) of this section or disallowed under subsection (d) or (e) of this

section, the same as if such claim had arisen before the date of the filing of the petition.

11 U.S.C. §507. Priorities

(a) The following expenses and claims have priority in the following order:
(1) First, administrative expenses allowed under section 503(b) of this title [11 USCS §503(b)], and any fees and charges assessed against the estate under chapter 123 of title 28 [28 USCS I1911 et seq.].
(2) Second, unsecured claims allowed under section 502(f) of this title [11 USCS §502(f)].

11. U.S.C. §726 Distribution of property of the estate

(b) Payment on claims of a kind specified in paragraph (1),(2),(3),(4),(5),(6), or (7) of section 507(a) of this title [11 USC §507(a)(1),(2),(3),(4),(5),(6), or (7)], or in paragraph (2),(3)(4), or (5) of subsection (a) of this section, shall be made pro rata among claims of the kind specified in each such particular paragraph, except that in a case that has been converted to this chapter [11 USCS §§701 et seq.] under section 1112, 1208, or 1307 of this title [11 USCS §1112, 1208, or 1307], a claim allowed under section 503(b) of this title [11 USCS §503(b)] incurred under this chapter [11 USCS §§701 et seq.] after such conversion has priority over a claim allowed under section 503(b) of this title [11 USCS §503(b)] incurred under any other chapter of this title [11 USCS §§101 et seq.] or under this chapter [11 USCS §§701 et seq.] before such

conversion and over any expenses of a custodian superseded under section 543 of this title [11 USCS §543].

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

IN RE:

AMERICAN READY MIX, INC.
a New Mexico corporation,
Federal ID #01-177568-00-8,

Debtor.

ALBUQUERQUE SAND & GRAVEL, INC.,
d/b/a American Sand & Gravel,Inc.
a New Mexico corporation,
Federal ID No. 85-0346640
State ID No. 02-062753-00-1,

Debtor.

No. 7-89-02832 RA
Jointly Administered

ORDER APPROVING MOTION TO APPROVE STIPULATED AGREEMENT TERMINATING AUTOMATIC STAY

THIS MATTER came before the Court for a hearing upon the Motion of Creditor Western Bank of Albuquerque (hereinafter "Western") for approval of a Stipulated Agreement Terminating Automatic Stay, which had been entered into and approved by Western, Trustee Daniel J. Behles (hereinafter "Trustee"), and the Debtor, pro se. Appearing at the hearing on May 10, 1991, was Western, by and through its Vice President, Jason A. Shaffer, and counsel, John F. Caffrey,

EXHIBIT 1

the Trustee, appearing in person and through counsel, Barbara, and Andrew Lopez, an objecting party (hereinafter "Lopez"), appearing pro se. After considering the arguments of counsel and Lopez, the testimony of the witnesses, and considering the physical exhibits and the bankruptcy file, the Court adopts the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. That on March 7, 1991, Western filed a Motion for Approval of a Stipulated Agreement Terminating Automatic Stay, a copy of which Agreement was attached to said Motion, and which had been entered into and approved by Trustee, the Debtor, and Western, which Agreement terminated the Automatic Stay of 11 USC §362, and allowed Western to foreclose upon its security interest in the collateral securing the loan (hereinafter "collateral"), which is described in detail in attachments to the Motion.

2. That on March 6, 1991, a Notice of

Deadline for Filing Objections to Motion to Approve Stipulated Agreement Terminating Automatic Stay was mailed to 143 parties, whose names appear on the Matrix in this case.

3. That on March 7, 1991, a Supplement to Notice of Deadline for Filing Objections to Motion to Approve Stipulated Agreement Terminating Automatic Stay was mailed to nineteen additional creditors or parties requesting notice.

4. That the Court file reveals that only two objections were filed to the afore-described Motion, those being the objections of Lopez and Berridge Distributing Company, Inc.

5. That the Court conducted a hearing on May 10, 1991, to take up Western's Motion and the objections thereto. Objecting party Berridge Distributing Company, Inc. failed to appear.

6. That the indebtedness owed Western by the Debtor exceeds $187,000, pursuant to two separate Promissory Notes, one dated May 20,

1988, in the original principal amount of $260,000 and a second dated July 24, 1989, in the original principal amount of $21,000, together with accruing interest and attorney's fees.

7. That the indebtedness owed Western is secured by the collateral.

8. That Western has properly perfected its security interest in the collateral.

9. That Western and Trustee have presented testimony with respect to the value of the collateral, and the Court finds that the value of the collateral does not exceed the amount of the indebtedness owed Western, and that there is no equity in said collateral for the benefit of the bankruptcy estate.

10. That no party has requested a hearing in a timely fashion as required by the provisions of 11 USCA §362(e).

11. That Lopez, the person opposing the Termination of the Automatic Stay, has not sustained the burden of proof that is imposed

upon him pursuant to the provisions of 11 USCA §362(g)(2).

CONCLUSIONS OF LAW

1. That Western has sustained its burden of proof on the issue of the Debtor's equity in the collateral in accordance with the provisions of 11 USCA §362(g)(1).

2. That Lopez has failed to sustain his burden of proof that is imposed upon him pursuant to the provisions of 11 USCA §362(g)(2).

3. That the automatic stay of 11 USC §362 should be lifted to allow Western to foreclose upon its security interest in the collateral. It is, therefore,

ORDERED, ADJUDGED AND DECREED that:

1. The automatic stay of 11 USC §362 is hereby terminated; and

2. The Motion of Western to Approve the Stipulated Agreement Terminating Automatic Stay is hereby approved to allow Western to foreclose upon its security interest in the collateral

securing the indebtedness owed Western by the Debtor which is more particularly described in the Motion to Approve the Stipulated Agreement Terminating Automatic Stay.

_____
UNITED STATE BANKRUPTCY JUDGE

Submitted and Approved:

DUBOIS, CAFFREY, COOKSEY & BISCHOFF, P.A.

_____
JOHN F. CAFFREY
Attorney for Western Bank
2040 Fourth ST., NW
Albuquerque, NM 87102

BEHLES, O'REILLY & BALL

_____
BARBARA A. BALL
Attorney for Chapter 7 Trustee
P.O. Box 415
Albuquerque, NM 87103

EXHIBIT 1

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

IN RE:

AMERICAN READY MIX, INC.
a New Mexico corporation,
Federal ID #01-177568-00-8,

Debtor.

ALBUQUERQUE SAND & GRAVEL, INC.,
d/b/a American Sand & Gravel,Inc.
a New Mexico corporation,
Federal ID No. 85-0346640
State ID No. 02-062753-00-1,

Debtor.

No. 7-89-02832 RA
Jointly Administered

NOTICE OF SALE OF COLLATERAL
BY WESTERN BANK OF ALBUQUERQUE

BY ORDER OF THE BANKRUPTCY COURT, the Automatic Stay has been terminated to allow Western Bank, Albuquerque, New Mexico ("Western Bank") to sell its collateral to satisfy the indebtedness owed Western Bank in the amount of approximately $190,000. The Bankruptcy Judge has determined that the value of the collateral is less than the amount of the outstanding indebtedness owed to Western Bank. The Bank proposes to sell this collateral to American Building Supply, Inc. (the "Corporation"), the principals of which are the individuals who originally guaranteed the indebtedness owed to Western Bank. Western Bank proposes to sell the collateral to the Corporation for the amount of the outstanding indebtedness. The sale to the Corporation will be consummated on May 29, 1991, unless a higher offer (payable only in cash or certified funds) is received by Western Bank before 2:00 p.m. on May 29, 1991. All offers

EXHIBIT 2

must be in writing and must be payable in cash or certified funds.

Offers and inquiries concerning this sale and to arrange for inspection of the collateral may be directed to Jason Shaffer, Senior Vice President, Western Bank of Albuquerque, 505 Marquette, N.W., P.O. Box 26144, Albuquerque, New Mexico, 87125-6144, (505) 888-9000.

DUBOIS, CAFFREY, COOKSEY & BISCHOFF, P.A.

GERALD E. BISCHOFF
Attorneys for Western Bank
2040 Fourth St., NW
Albuquerque, NM 87102
(505) 243 6721

EXHIBIT 2

May 20, 1991

FACSIMILE NO. (505) 823 3368

Albuquerque Journal
7777 Jefferson, NE
Albuquerque, NM 87109

ATTN: Classified Advertising

To Whom it May Concern:

Enclosed is a copy of the advertisement I would like placed in the "Equipment Sales" section of the classified ads of the Albuquerque Journal. I would like this to be published in the Journal for four (4) days starting on Wednesday, May 22, 1991, and ending on Saturday, May 25, 1991.

After publication please send your bill and I will see to it that you are paid right away.

If you have any questions, please contact the undersigned at the telephone number above. Thank you for your cooperation.

Very truly yours,

DUBOIS, CAFFREY, COOKSEY & BISCHOFF, P.A.

Gerald E. Bischoff

GEB:wc
Enclosure

EXHIBIT 3

Equipment and vehicles formerly used in sand and gravel business for sale. Minimum price $190,000.00. Inquiries call Jason at 888-9000 or write to P.O. Box 26144, Albuquerque, NM, 87125-6144.

EXHIBIT 3

AFFIDAVIT OF PUBLICATION

RECEIVED
MAY 29 1991
DUBOIS, CAFFREY & COCKSEY, P.A.
ATTORNEYS AT LAW

Health City Sun

Office: 900 Park Ave., S.W. - Dial 242-3010
Mail Address: P. O. Box 1517
Albuquerque, New Mexico 87103

State of New Mexico }
County of Bernalillo } ss.

Alicia Alvarez, being duly sworn declares and says she is the business manager of the Health City Sun, a weekly newspaper published and having a general paid circulation in the city of Albuquerque, County of Bernalillo, and State of New Mexico; that the said Health City Sun was entered in the post office at Albuquerque as second class mail matter on September 5, 1930, and has met all requirements of a legal newspaper under the laws of the State of New Mexico.

Affiant further states that this newspaper is duly qualified to publish Legal Notices or advertisements within the meaning of Section 14-11-4 of the New Mexico Statutes annotated (1978).

Affiant further states that the publication, a copy of which is hereto attached, was published in said paper in the regular and entire issue of each number of the paper, during the period and time of publication, and that the notice was published in the news paper proper and not in a supplement thereof for 1 weeks, the first publication being on the 24th day of May, 19 91, and the last publication being in the issue of the _____ day of _____, 19___.

Affiant further states that the costs of publishing said legal notice have been paid, or have been assessed as court costs in the case numbered.

Alicia Alvarez

Subscribed and sworn to before me, a Notary Public in and for said County and State, this 24th day of May, 19 91.

Notary Public

My Commission expires 11/28/91

UNITED STATES
BANKRUPTCY COURT FOR THE
DISTRICT OF NEW MEXICO
No. 7-89-02832 MA
[Jointly Administered]

In re:
AMERICAN READY MIX, INC.,
a New Mexico corporation,
Federal ID #01-177568-00-8,
Debtor,
ALBUQUERQUE SAND & GRAVEL, INC.
d/b/a American Sand & Gravel, Inc.,
a New Mexico corporation,
Federal ID # 85-0346640
State ID No. 02-062753-00-1,
Debtor.

NOTICE OF SALE OF COLLATERAL BY WESTERN BANK OF ALBUQUERQUE

BY ORDER OF THE BANKRUPTCY COURT, the Automatic Stay has been terminated to allow Western Bank, Albuquerque, New Mexico ("Western Bank") to sell its collateral to satisfy the indebtedness owed Western Bank in the amount of approximately $190,000.00. The Bankruptcy Judge has determined that the value of the collateral is less than the amount of the outstanding indebtedness owed to Western Bank. The Bank proposes to sell this collateral to American Building Supply, Inc. (the "Corporation"), the principals of which are the individuals who originally guaranteed the indebtedness owed Western Bank. Western Bank proposes to sell the collateral to the Corporation for the amount of the outstanding indebtedness. The sale to the Corporation will be consummated on May 29, 1991, unless a higher offer (Payable only in cash or certified funds), is received by Western Bank before 2:00 o'clock P.M. on May 29, 1991. All offers must be in writing and must be payable in cash or certified funds.

Offers and inquiries concerning this sale and to arrange for inspection of the collateral may be directed to Jason Shaller, Senior Vice President, Western Bank of Albuquerque, 505 Marquette, N.W., P.O. Box 26144, Albuquerque, New Mexico 87125-6144, (505) 888-9000.

DUBOIS, CAFFREY, COOKSEY & BISCHOFF, P.A.
BY: /s/ Gerald E. Bischoff
GERALD E. BISCHOFF
Attorneys for Western Bank
2040 Fourth Street, N.W.
Albuquerque, New Mexico 87102
Telephone: (505) 243-6721

HCS Legal No. 1379; Pub. May 24, 1991

EXHIBIT
4

Supreme Court, U.S.
FILED
JUL 14 1994
OFFICE OF THE CLERK

No. 93-1972

SUPREME COURT OF THE UNITED STATES

October Term, 1993

ANDREW LEO LOPEZ,

Petitioner,

vs.

DANIEL J. BEHLES, *et al.*,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S REPLY BRIEF

Andrew Leo Lopez, MBA, CPA
Petitioner *Pro Se*
P. O. Box 12035
Albuquerque, NM 87195
(505) 242-0412 (AM only)

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PETITIONER'S REBUTTAL ARGUMENTS

General Items

Respondents confuse Debtor[s], two corporations with the Debtor-in-Possession a natural person with fiduciary duties to the creditors of the estate[s] including Petitioner.

The Debtor corporations were never represented by anyone during the pendency of the proceeding under Chapter 7 of the U.S. Bankruptcy Code except the Trustee who is one of two respondents in this action and a corporation may not appear *Pro Se* [See Respondent's Brief at p. 20].

Petitioner was never an employee of the Debtors-in-Possession [R.B. at p. 1, ¶ 3] but of the Debtor's estates.

Respondents [R.B. at p. 2, ¶ 7] admit that the parties including both fiduciaries, Trustee and Debtor-in Possession [not the Debtor corporations] made a deal amongst themselves [R.B. at p. 26 & Exhibit 4] before asking the

Court to lift the stay on assets previously abandoned by the Trustee [R.B. at p. 2, ¶ 6] without notice to anyone and before allegedly soliciting bidders to maximize value.

Petitioner [R.B. at p. 1, ¶ 5] did not enter an appearance in the sense of a newcomer to the case, but only to enter formally the mailing list [matrix] because mailings were previously sent to the Debtors' attorney who had withdrawn.

Respondent Trustee [R.B. at p. 2, ¶ 6] abandoned assets that were collateral for Respondent Western Bank and assets that were collateral for Val and Sons who never contested Petitioner's appeals of the matter. In neither case did Trustee give notice or provide any economic analysis except his own conclusory testimony, that the value of the assets was less than the notes against the assets.

Respondents [R.B. at p. 2, ¶ 8] correctly state that Petitioner appeared at a hearing that took place on May 10, 1991, but neglect to state

that he did not receive notice until two days before the hearing and the rules require 20 days of notice. Thus, Petitioner could have no time to prepare for a complex valuation or engage an appraiser of mining equipment pursuant to 11 U.S.C. 362(q)(2) to value the estate or its assets.

Respondents concentrate on matters of interest to Respondent Western Bank but ignore the live controversy before the Court involving the abandonment of collateral by the Trustee without notice that was purchased by its secured creditor of Val and Sons which never contested any of Petitioner's averments nor even filed papers of any kind in any of the actions to date including this one. In other words even if one part [and none herein are] of a controversy is moot not all other parts are moot.

Petitioner is an administrative claimant who is not an unsecured creditor in the usual sense of a trade creditor in the ordinary course of business and his claim is perfected without

need [R.B. at p. 10] of a fee application. The argument is utterly specious especially in view of the fact that Petitioner filed his proof of claim upon motion by the Trustee more than three years ago and the time to object lapsed long ago.

Respondents [R.B. at p. 3, ¶ 9] mention the Court's Order [R.B. at pp. 20-25], but neglect to state that the Order was prepared by John F. Caffrey [R.B. at p. 25] for Respondents which was literally rubber-stamped by someone in the Court's offices. This Court and numerous other courts properly look askance at orders prepared by litigants and this Order bears the embellishments that courts worry about:

a) R.B. p. 20. The Debtor did not and could not appear *Pro Se*;

b.) R.B. p. 21, ¶ 2. Notice was not mailed timely;

c.) R.B. p. 23, ¶ 9. Testimony of value pursuant to 11 U.S.C. § 362(q)(1) was bank loan officer who made original loan, who now said

equipment was worth about 25 cents on the dollar, but who loaned all of the amount due [Petitioner's Reply Brief at Appendix A-1 and R.B. at p. 26 and Exhibit 4] and possibly more taking only the equipment as collateral and the signatures of the same or fewer guarantors as before. Court allegedly in its Order found that [R.B. at p. 3, ¶ 10] found no equity and value less than debt, but bank loaned at least the entire amount of the debt to the Debtor-in-Possession and another former guarantor. Thus did the bank establish the minimum value of the collateral with depositor's money no less;

d.) R.B. at p. 23, ¶ 10. The Court refused to schedule pursuant to 11 U.S.C. § 362(e) a timely hearing even though objections were filed timely;

e.) R.B. at p. 23, ¶ 11 fails to state that failure to give timely notice [two days before hearing] prevented Lopez from compliance with 11 U.S.C. § 362(q)(2) and that Respondent

Western Bank has the burden of proof under 11 U.S.C. § 362(q)(1).

Respondents [R.B. at p. 3, ¶ 11] admit a private sale and [P.R.B. at A-1; R.B. at pp. 26-27; R.B. at p. 29; R.B. at p. 30?, Exhibit 4] show that there was a preferred purchaser and Respondents acted in concert with the blessing of the Court to chill the bidding and rig the bidding so that there could only be one outcome: sale to the former Debtor-in-Possession who owed Western Bank for other loans [i.e. if Debtor-in-Possession acquires valuable, money-making assets from Western Bank, he is much better able to pay the other loans and of course keep perhaps as much as $1,000,000 of annual deposits at the bank].

Respondents [R.B. at p. 4, ¶ 12] cite Exhibit 3 [there are two 3's] at page 29 as an example of a public notice. The information given is ludicrous and the Court needs but compare with Exhibit 4 facing page 29.

Respondents [R.B. at p. 4, ¶ 13] claim a legal notice in a periodical [newspaper published only each Friday] published only for legal notices despite its name. The affidavit [R.B. at Exhibit 4] which was confirmed by Petitioner's telephone call shows publication only once on Friday, May 24, 1991 where and when few if any potential bidders would notice and only five days, including the weekend, before the transaction was to close with the preferred bidder.

There were [R.B. at p. 4, ¶ 14] no other bidders because Respondents had pre-qualified the former Debtor-in-Possession [P.R.B. at A-1]; had arranged to finance the purchase for at least the amount due; had arranged for financing from Western Bank prior to the public notice; had failed to give timely notice to anyone else of available bank financing for the bid price; had failed to give timely and informative notice to other potential bidders in publications where this kind of equipment is normally offered for

sale; had only announced the impending sale; had solicited by announcing a done deal five days before closing and stating that anyone else had to come up with more cash or a certified check for more than the contemplated closing price. Thus, did Respondents, the Bankruptcy Court and the former Debtor-in-Possession rig the sale, rig the bid and eliminate every other possible bidder and foist a legal fraud on the creditors with the full acquiescence of the Court which was trying to bury a wrongful conversion with the help of the Trustee and Western Bank.

Respondents' comment [R.B. at p. 17] about Petitioner's alleged conduct at hearings is ludicrous and without a scintilla of support anywhere in the record and but a transparent, tawdry attempt to prejudice this Court.

Respondents' [R.B. at p. 17] comments about Petitioner's attendance at hearings without objection from Respondents or anyone else and with the approval of the Bankruptcy Court

suggest constructive application of Bankruptcy Rule 2018(a).

Standing

As a general rule, creditors have standing to appeal Orders of the Bankruptcy Court disposing of property of the estate because such Orders directly affect the creditors' ability to receive payment of their claims. *Kane v. Johns-Manville Corp*, 843 F.2d 636, 642 (2nd Cir. 1988).

The general rule, well settled, applies even when the *schema* of payment priorities drops an administrative claimant in a Chapter 11 proceeding below the claims of administrative [R.B. at p. 10] claimants in an involuntary conversion to Chapter 7.

The principle of trustee representation is not always strictly applied, *Matter of Carbide Cutoff, Inc.*, 703 F.2d 259, 264 (7th Cir. 1983); See also In Re *Tyne*, 261 F.2d 249, 251 (7th Cir. 1959) and one court refused to apply the principle to a case involving a claimant [as

here], not a creditor in the ordinary sense of the word [as here] whose interests were adverse [as here] to the trustee, In Re *Huntingdon & Broad Top Mountain R.R. & Coal Co.*, 213 F.2d 411, 415 and another court allowed an appeal to proceed where no objection [to standing] was raised [as here] in the court below. ***Tyne*** at 252.

If the objecting party did not [as here] receive proper notice of the proceedings below and of his opportunity to object to the action proposed to be taken, the requirements of due process outweigh those of judicial efficiency and certainty. In Re *Commercial W. Fin. Corp.*, 761 F.2d 1329, 1335 (quoting R. Levin Bankruptcy Appeals, 58 N.C.L. Rev. 967, 978 (1980)).

Notice must be provided to "all creditors at least 20 days in advance. In Re *Globe Investment & Loan Co.*, 867 F.2d 556, 560 (9th Cir. 1989).

Further, the financing arrangements [100.0% by the bank holding the collateral] and sale

back to the Debtor-in-Possession strongly suggest that the collateral was worth more than the purchase price and a *bona fide* auction would produce a surplus for the creditors.

In the *Matter of Andrerccetti*, 975 F.2d 413 (7th Cir. 1992) an appellant was held to have standing to appeal based [as here] upon his interest that arose from the Trustee's settling of suits for less than what would be needed to create a surplus. Long before the issue of standing arose Lopez stated that if his appeal were successful, he would pursue or cause to be pursued those claims against third parties which Lopez views as likely to produce residual value to the Debtors. *Id.* at 417.

Finally, Petitioner perfected his claim [R.B. at pp. 11-12] years ago and need not yet file an application to be paid in a case which remains open.

Therefore, this Court should issue a *Writ*.

Mootness

When a bankruptcy court authorizes a sale of assets pursuant to Section 363(b)(1) [as here], it is required to make a finding with respect to the "good faith" pursuant to 11 U.S.C. § 362(m) of the purchaser. In Re *Abbotts Dairies of Pennsylvania, Inc.*, 788 F.2d 143, 149-50 (3rd Cir. 1986) and absent [R.B. at pp. 20-25] a finding of good faith an appeal is not moot, ***Abbotts*** especially where a Debtor-in-Possession violated his fiduciary duties to the Debtors' creditors. ***Id.*** at 151.

For judicial notice John F. Caffrey, Esq. prepared and filed the Order of the Bankruptcy Court which someone later rubber stamped. Thus despite every single advantage that a stacked court could provide, Respondents fail a key test: no finding of "good faith."

"Typically, the misconduct [See General Items *Supra*] that would destroy a purchaser's good faith status at a judicial sale involves fraud, collusion between the purchaser and other

bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders." In Re *Rock Industries Machinery Corp.*, 572 F.2d at 1198.

Moreover, the Bankruptcy Court's failure to find and conclude "good faith" precludes the necessity of obtaining a stay from a court which was doing everything possible to quickly bury a wrongful conversion.

In addition, the mootness rule does not prevent the hearing of an appeal [as here] where monetary relief is sought. *American Grain Assoc. v. Lee Vac Ltd.*, 630 F.2d 245, 248 (5th Cir. 1980).

Further, in *Wolverton v. Shell Oil Company*, 442 F.2d 666, 669-70 the Court refused to uphold a private sale to a bankrupt [here a Debtor-in-Possession who later went bankrupt] because of the great potential for skulduggery.

In *Sullivan Central Plaza I, Ltd.*, 914 F.2d 731, 734 (5th Cir. 1990) the Court stated, "The buyer [other parties as well] is readily on

notice that he is not entitled to rely on the finality of the foreclosure sale when all parties are before the Court [as here] and there is evidence of misconduct [as here] in the foreclosure" and the Court specifically held that wrongful foreclosures may be reversible. ***Id.***, See *Henke v. First Southern Properties, Inc.*, 586 S.W.2d 617.

Because the record shows collusion to rig a sale and all parties are before this Court, the Court has the power to exercise its equitable jurisdiction to sift the circumstances surrounding any claim to see that injustice is not done in the administration of the bankrupt estate, *Pepper v. Litton*, 308 U.S. 295, 307-08, 60 S.Ct. 238, 245-246, this Court should issue a *Writ*.

Trial Court Recusal

Most of Respondents' citations in the matter of recusal consider 11 U.S.C. § 144 and not 11 U.S.C. §§ 455(a) and 455(a)(1). Therefore, they help not Respondents' position.

Petitioner's challenge of the bankruptcy judge arises from his abuse of discretion, *Jaffree v. Wallance*, 837 F.2d 1461, 1465 (11th Cir. 1988) in denying Petitioner's Motion to Recuse grounds for which are found in the record of the Court's conduct of the case and prejudice arising from evidence that was improperly introduced [See Petition at p. A-11] which produced [uncontested] a biased court.

Further, this Court should consider and settle the standing of all professional employees of a bankruptcy estate to move a bankruptcy court for recusal of the presiding judge where circumstances warrant.

Moreover, Respondents fail to address the issue of the duty of a professional employee who is a Certified Public Accountant to preserve the estate of a debtor and his standing to discharge the duty by challenging the wrongful orders of a bankruptcy court by appeal to a higher court.

The standard of recusal under 28 U.S.C. §§ 455(a) and 455(b)(1) is whether a reasonable

person, knowing all of the facts, would conclude that the Court's impartiality might reasonably be questioned. In Re *Drexel Burnham Lambert, Inc.*, 861 F.2d at 1313 (construing 455(a)); *Apple v. Jewish Hospital and Medical Center*, 829 F.2d at 333 (construing 455(b)(1)); See also *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 108 S.Ct. 2194, 2201 N.7. (1988).

Thus, the test to be applied is an objective one which assumes that a reasonable person knows and understands all the relevant facts. *Pepsico, Inc. v. McMillen*, 764 F.2d 458, 460 (7th Cir. 1985); *Hinman v. Rogers*, 831 F.2d 937, 939 (10th Cir. 1987). Moreover, in *Liljeberg* this Court emphasized that in amending 28 U.S.C. § 455(a) Congress aimed to promote public confidence in the judiciary by avoiding even the appearance of impropriety.

Under the broader standard of revised 11 U.S.C. § 455(a) disqualification is appropriate not only where there is actual or apparent bias or prejudice, but also when the circumstances

were such that the judge's "impartiality might be reasonably questioned." See *13 Wright, Miller & Cooper*, Federal Practice and Procedure; Jurisdiction, § 3549; *United States v. Ritter*, 540 F.2d 459, 462, cert denied S.Ct. 370 (10th Cir. 1976); See also *United States v. Gigax*, 605 F.2d at 511.

Moreover, the Tenth Circuit quoting with favor in *United States v. Page*, 828 F.2d 1476, 1481 (10th Cir. 1987), "The Fifth Circuit has enunciated an exception to the requirement of extrajudicial bias, when "such persuasive bias and prejudice is shown by otherwise judicial conduct as would constitute bias against a party" and "A judge's participation in a given case may on occasion form the basis for a finding of bias." *Blizzard v. Fielding*, 454 F.Supp. at 721; See also *Ouchita Nat. Bank v. TOSCO Corp.*, 686 F.2d 1291, 1301 (1982).

Therefore, where a bankruptcy judge has made a wrongful conversion [undisputed] from reorganization to liquidation under the

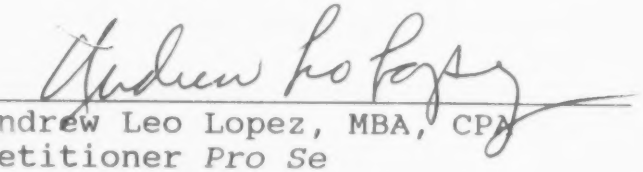
bankruptcy code and sought to cover the matter with specious findings of fact and conclusions of law [undisputed] he can not hold the balance nice, clear, and true between Petitioner and opposing parties, *Tumey v. Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 44, nor can he hold the balance between vindicating the interests of the Court and the interests of the Petitioner, *Ungar v. Saravite*, 376 U.S. 575, 588, 84 S.Ct. 841, 845 (1964), he should be ordered from the case by this Court and this Court should issue a *Writ*.

CONCLUSION

Because there are live controversies before this Court in a bankruptcy case involving serious matters which affect millions of pending cases and billions of assets this Court should issue a *Writ of Certiorari* to the Tenth Circuit, stay pending resolution of the *Writ* publication of the opinion under review, reverse the Judgment of the United States Court of Appeals for the Tenth Circuit, and order such other and

further relief as the Court may find just under these premises.

Respectfully submitted,



Andrew Leo Lopez, MBA, CPA
Petitioner *Pro Se*
P. O. Box 12035
Albuquerque, NM 87195
(505) 242-0412 (A.M. only)

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ANDREW LEO LOPEZ, MBA, CPA,

Plaintiff-Appellant,

vs. CIVIL NO. 91-532 JP/RWM

DANIEL BEHLES, Trustee for
American Ready Mix, Inc., and
Albuquerque Sand and Gravel Inc.,
and WESTERN BANK,

Defendants-Appellees.

APPELLEE WESTERN BANK'S RESPONSE TO
APPELLANT'S MOTION TO RECONSIDER
APPELLEE'S MOTION TO DISMISS APPEAL

COMES NOW Appellee Western Bank by and through its attorneys Dubois, Caffrey, Cooksey, Bischoff, P.A. (John F. Caffrey) and in response to the Motion of Appellant Andrew Leo Lopez to reconsider the decision of the Court granting Appellee's Motion to Dismiss Appeal, filed on or about January 16, 1992, states as follows:

Appellee wishes to dispute the statement made in Paragraph 4 of Appellant's Motion which stated:

> "In oral argument before the Magistrate Court Appellee's counsel, John F. Caffrey, Esq. admitted Appellant's accusation of bid rigging;"

This statement is factually untrue. What was stated at the hearing before Judge McCoy was that the collateral was to be sold to a new corporation formed by the guarantors of the original loan who had arranged and pre-qualified for a new loan equal to the balance of the original loan. Only a higher cash offer would defeat this sale. This is not "bid-rigging" nor has there ever been an admission that this conduct constitutes "bid-rigging" or any other type of impermissible conduct.

Appellant's Motion and argument ignores the mootness issue and, instead, argues the alleged merits of the appeal and does not suggest how the Court's decision is improper.

WHEREFORE, Appellee respectfully prays that the Court deny the Appellant's Motion to reconsider the Court's decision granting

Appellee's Motion to dismiss the appeal as being moot.

DUBOIS, CAFFREY, COOKSEY & BISCHOFF, P.A.

BY: _____

John F. Caffrey
2040 4th Street, NW
Albuquerque, NM 87102
(505) 243-6721

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to:

Andrew Leo Lopez
P. O. Box 12035
Albuquerque, NM 87195

on January 21, 1992.

_____
John F. Caffrey

APPENDIX B

STATUTES AND VERBATIM CONTENT

11 U.S.C. § 362(e)

(e) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section ....

11 U.S.C. § 362(g)(1)

(1) The party requesting such relief has the burden of proof on the issue of the debtor's equity in the property;

11 U.S.C. § 362(g)(2)

(2) The party opposing relief has the burden of proof on all other issues.

11 U.S.C. § 363(m)

The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the

appeal, unless such authorization and such sale or lease were stayed pending appeal.

28 U.S.C. § 144

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before who the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party; such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term [session] at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

28 U.S.C. § 455(a)

Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

28 U.S.C. § 455(b)(1)

He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

Rules

Bankruptcy Rule 2018(a): Intervention, Right to be Heard

(a) Permissive intervention. In a case under the Code, after hearing on such notice as the court directs and for cause shown, the court may permit any interested entity to intervene generally or with respect to any specified matter.